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Enacting Libertarian Property: Oregon's Measure 37 and Its Implications

ENACTING LIBERTARIAN PROPERTY: OREGON'S MEASURE 37 AND ITS IMPLICATIONS

MICHAEL C. BLUMM[†] & ERIK GRAFE^{††}

In November 2004, for the second time in four years, Oregon voters opted for a radical initiative that is transforming development rights in the state. The implications of this substantial change in property rights have yet to be fully realized, but it is clear that the post-2004 land use world in Oregon will be dramatically different than the previous thirty years.

Land development rights in the state were significantly curtailed by a landmark law the Oregon legislature, encouraged by pioneering Governor Tom McCall, enacted in 1973. Implementation of that law survived three separate initiatives that sought to rescind it in the 1970s and 1980s. But after a hiatus of a decade and a half, land planning opponents put on the ballot a scheme that promised landowners either compensation or a regulatory waiver from land use requirements imposed after they—or a family member—acquired the land in question. That 2000 measure, which the voters approved as an amendment to the Oregon Constitution, was struck down by the Oregon Supreme Court for violating the state constitutional requirement that initiatives be limited to only a single subject.

Undaunted, the opponents of Oregon land use planning put another initiative on the ballot in 2004 quite similar to the 2000 initiative, except that this initiative was a statutory amendment, not a constitutional amendment. Thus, it was not burdened by the concerns that led to the 2000 measure's judicial rejection. This measure, known as Measure 37, promises to transform land use regulation in Oregon and the Oregon landscape in the process.

This article explains the background, politics, and implementation of Oregon's experiment in creating what is the leading example of libertarian property in the world. The article examines early judicial and attorney general interpretations of the measure and its predecessor and focuses attention on the many ambiguities in the measure's language, particularly the uncertain scope of its express exceptions from compensation. Measure 37's proponents have attempted to export its principles to other states and, in 2006, Arizona joined Oregon as another labora-

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tory for libertarian property. Finally, as this article was in press, the Oregon electorate approved a referendum aimed at clarifying some of Measure 37's ambiguities, expediting regulatory waivers for small residential developments, and making them transferable, but making commercial, industrial, and large residential developments ineligible for regulatory waivers or compensation.

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INTRODUCTION

In November 2004, Oregon voters adopted Measure 37, an initiative revolutionizing property rights in the state.¹ The initiative was actually the second time in four years the Oregon electorate opted for radical property rights change; an earlier version, passed in 2000, was struck down by the Oregon Supreme Court for violating the state constitution.² Despite the radical nature of the initiative—which promised landowners complete compensation for any regulation reducing any value of land imposed after acquisition by the owner or her family—the measure passed easily, with a majority of over 60 percent.³ It was later upheld by the state supreme court, which overturned a lower court decision,⁴ so the measure is now in the process of transforming the Oregon landscape.

Oregon might seem an unlikely place for a property rights revolution to take hold. For over thirty years, the state pursued statewide land use planning on a scale not witnessed in any other American state.⁵ This commitment to rational, areawide planning channeled development within urban growth boundaries, preserved rural forest and farmlands, and encouraged efficient infrastructure and transportation planning, of no small significance in a world increasingly concerned with reducing carbon emissions.⁶ The Oregon system also interjected the state into a host

1. Oregon Governments Must Pay Owners or Forgo Enforcement When Certain Land Use Restrictions Reduce Property Value, ch. 197 Ballot Measure 37 (Measure 37) (2004) (codified at OR. REV. STAT. § 197.352 (2005)).

2. Amends Oregon Constitution: Requires Payment to Landowner if Government Regulation Reduces Property Value (Measure 7) (2000), available at <http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/m7.htmf> (struck down as unconstitutional in *League of Or. Cities v. State*, 56 P.3d 892, 896 (Or. 2002)).

3. Or. Secretary of State, General Election Abstract of Votes on State Measure No. 37 (Nov. 2, 2004), <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf>.

4. *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 312 (Or. 2006), overturning the circuit court decision, *MacPherson v. Dep't of Admin. Servs.*, No. 05C10444, slip op. at 23 (Marion County Cir. Ct. Oct. 14, 2005), available at <http://www.ojd.state.or.us/mar/documents/Measure37.pdf>; see *infra* notes 172-213 and accompanying text.

5. GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON 227* (1992) (describing Oregon's land use planning system and noting that it has served as a model to other states); H. JEFFREY LEONARD, *MANAGING OREGON'S GROWTH: THE POLITICS OF DEVELOPMENT PLANNING 134-37* (1983) (describing Oregon's land use planning system and noting that it has served as a model to other states). See generally *PLANNING THE OREGON WAY: A TWENTY YEAR EVALUATION* (Carl Abbott, Deborah Howe & Sy Adler eds., 1994).

6. LEONARD, *supra* note 5, at 33 (noting that protection of farm and forest land, and channeling development within urban growth boundaries, are central tenets of Oregon's land use planning system); Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 817-24 (1998) (describing Oregon land use planning system); Matthew A. Light, Note, *Different Ideas of the City: Origins of Metropolitan Land-Use Regimes in the United States, Germany, and Switzerland*, 24 YALE J. INT'L L. 577, 582 n.19 (1999) (noting that Oregon's comprehensive state law finds no parallel in the United States, although it resembles German and Swiss land use policies); Jason A. Robison, Note and Comment, *Shaping Oregon Climate Policy in Light of the Kyoto Protocol* 21 J. ENVTL. L. & LITIG. 207, 228 (2006)

of land development decisions that in other jurisdictions are typically made by local officials.⁷ Although the ensuing land use restrictions generated opposition, Oregon voters ratified the land use planning system three times during its first ten years of existence.⁸

But the situation changed in the 1990s, when a libertarian property rights group began to challenge what it considered to be Oregon's land use overregulation. This group, Oregonians In Action, assisted Florence Dolan in her successful 1994 appeal to the U.S. Supreme Court, claiming development conditions imposed by the city of Tigard unconstitutionally took her property rights.⁹ Moving to more wholesale reform, the group spearheaded the effort that put Measure 37 and its 2000 predecessor on the ballot and later defended the constitutionality of each. Although the 2007 Oregon Legislature has asked the voters whether to amend Measure 37,¹⁰ there is no doubt that the rise of libertarian property has forever altered the landscape of property rights in the state, and that of Arizona as well, where voters approved a Measure 37-like initiative in 2006.¹¹

(discussing how Oregon's land use planning program addresses climate change by, for example, preserving forests and agricultural land). *See also infra* Part I.

7. *See, e.g.*, OR. REV. STAT. § 197.646 (2005) (requiring local government to amend the state's comprehensive plan and land use regulations to implement new land use statutes and LCDC land use goals and rules); James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 529-35 (1994) (discussing interaction between state and local government under statewide land use planning systems); *cf.* 4 ANDERSON'S AMERICAN LAW OF ZONING § 24.01 (Kenneth H. Young ed., 4th ed. 1996) ("[T]he legislation of most states continues to reflect an underlying assumption that the control of land use is basically a local problem.").

8. Citizen initiatives which would have repealed or severely curtailed statewide land use planning appeared on the 1976, 1978 and 1982 ballots. Voters rejected these measures overwhelmingly—by a margin of 57 to 43 percent in 1976, 61 to 39 percent in 1978, and 55 to 45 percent in 1982. *See* CITY CLUB OF PORTLAND, MEASURE 7 AND COMPENSATION FOR THE IMPACTS OF GOVERNMENT REGULATION 19-20 (2002), available at http://www.pdxcityclub.org/pdf/Measure7_2002.pdf (discussing ballot measures); Oregon Blue Book, Initiative, Referendum and Recall, <http://bluebook.state.or.us/state/elections/elections19.htm> (last visited Nov. 4, 2007) (giving election results for 1976 and 1978 ballot measures); Oregon Blue Book, Initiative, Referendum and Recall, <http://bluebook.state.or.us/state/elections/elections20.htm> (last visited Nov. 4, 2007) (giving results for 1982 ballot measure).

9. *Dolan v. City of Tigard*, 512 U.S. 374, 374-95 (1994). *See generally* *Colloquy*, *Dolan v. City of Tigard: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit*; *Dolan v. City of Tigard*, 25 ENVTL. L. 111 (1995).

10. *See infra* Part VI.

11. Private Property Rights Protection Act, Ariz. Prop. 207 § 12-1134 (Proposition 207) (2006) (codified at ARIZ. REV. STAT. § 12-1134 (2007)). Arizona's Proposition 207 was adopted by a landslide margin of 64.8 to 35.2 percent. Ariz. Secretary of State, 2006 General Election Results, <http://www.azsos.gov/results/2006/general/BM207.htm>. Voters in California, Washington and Idaho rejected Measure 37-type ballot initiatives in the 2006 elections, however. California's Proposition 90 failed by a margin of 47.6 to 52.4 percent; Washington's Initiative 933 failed by a margin of 41 to 59 percent; and Idaho's Proposition 2 failed by a margin of 24 to 76 percent. *See* Cal. Secretary of State, Statement of Vote, 2006 General Election, http://www.ss.ca.gov/elections/sov/2006_general/measures.pdf (last visited Nov. 4, 2007); Wash. Secretary of State, 2006 Election Results, <http://vote.wa.gov/Elections/general/Measures.aspx> (last visited Nov. 4, 2007); Idaho Secretary of State, November 7, 2006 General Election Results, Statewide Totals, http://www.idsos.state.id.us/ELECT/RESULTS/2006/general/tot_stwd.htm (last visited Nov. 4, 2007).

It is worth pausing to consider why libertarian property would appeal to the voters of the early twenty-first century. One reason may be that its message is deceptively simple: to allegedly restore individual property rights, which the federal and most state constitutions protect against “takings” for public use without payment of “just compensation.”¹² What is meant by property rights, however, is hardly ever explained. There seems to be a subliminal libertarian message that property rights equate to development rights, and that regulation—or at least some kinds of regulation—limiting a landowner’s right to develop is impermissible without constitutionally required compensation. This version of libertarian thought was not part of the intent of either the U.S. or Oregon constitutional framers.¹³ Moreover, the Supreme Court found no regulatory takings until 1922,¹⁴ and both that Court and the Oregon Supreme Court have largely rejected regulatory takings allegations ever since.¹⁵ In short, libertarian property has never dominated judicial thinking, although it has a few adherents in the legal academy.¹⁶

Libertarian property has been out of the mainstream because it is based on several flawed assumptions. Libertarians see property in static terms, with fixed boundaries and clearly defined rights.¹⁷ But, in fact, property rights are created and evolve over time to meet a society’s felt necessities; one’s development rights are less dependent on landowner

12. See, e.g., U.S. CONST. amend. V; ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 19; IDAHO CONST. art. I, § 14; OR. CONST. art. I, § 18; WASH. CONST. art. I, § 16.

13. See generally John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); Derek O. Teaney, Comment, *Originalism as a Shot in the Arm for Land-Use Regulation: Regulatory “Takings” Are Not Compensable Under a Traditional Originalist View of Article I, Section 18 of the Oregon Constitution*, 40 WILLAMETTE L. REV. 529 (2004).

14. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412-16 (1922) (concluding that a state subsidence control statute took a coal company’s reserved mining rights by forbidding mining under homes and other specified places).

15. See *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 306-43 (2002) (development moratorium imposed during the process of devising a comprehensive land-use plan not a taking); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 473-74 (1987) (state subsidence control statute—quite similar to that in *Pennsylvania Coal* requiring a coal company to keep 50 percent of its coal in place and to repair any subsidence-caused damage not a taking, see case cited *supra* note 14); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122-38 (1978) (New York’s landmark preservation ordinance, which prevented the owner of Grand Central Station from constructing a development over the station not a taking); *Coast Range Conifers, LLC v. State ex rel. Or. State Bd. of Forestry*, 117 P.3d 990, 991 (Or. 2005) (prohibiting logging of nine acres of a forty-acre parcel by regulation not a taking because thirty-one acres of the parcel were unaffected); *Dodd v. Hood River County*, 855 P.2d 608, 610-16 (Or. 1993) (zoning law preventing siting of a dwelling on parcel ruled not a taking because some economic benefit from harvesting the parcel’s timber remained).

16. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 349 (1985); James L. Huffman, *A Coherent Takings Theory At Last: Comments On Richard Epstein’s Takings: Private Property and the Power of Eminent Domain*, 17 ENVTL. L. 158-76 (1986) (favorably reviewing book). Professor Huffman successfully argued the case defending Measure 37 before the Oregon Supreme Court.

17. See ERIC T. FREYFOGEL, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 7, 175 (2003).

boundaries than the character of the neighborhood.¹⁸ For libertarians, property rights are individualistic bulwarks against the Leviathan state;¹⁹ some even maintain that property rights are pre-political in nature.²⁰ Yet property rights are created by the state, to serve community ends, and depend upon state enforcement.²¹

Libertarians view property value as landowner created, whereas that value is usually due more to the character of the neighborhood, surrounding improvements, the health of the land itself, and tax policy.²² For libertarians, liberty is the paramount value, but there are other competing and cherished values like conservation and ecosystem health. Libertarian property undermines conservation and ecosystems by fragmenting landscapes, increasing transboundary problems, and inhibiting protection of resources like wildlife that require landscape-scale coordination.²³ Libertarian property's equation of property with development rights also ignores the fact that development often interferes with neighbors' quiet enjoyment rights.²⁴

The flawed assumptions underlying libertarian property explain why it has never been broadly accepted by the courts. Consequently, takings claimants have seldom succeeded in obtaining judicially ordered

18. See *id.* at 16-18, 27-28 (discussing the contextual nature of property rights); *id.* at 65-99 (providing examples of how property rights evolve over time).

19. See, e.g., James L. Huffman, *The Role of Courts in the Implementation and Administration of Environmental Legislation*, THE ADVOCATE, Spring 1984, at 9, 13 ("The American Leviathan state is ample evidence that democracy provides little protection from state intrusion into private decision making.").

20. See, e.g., EPSTEIN, *supra* note 16, at 5, 230-31 (embracing natural rights theory, which "asserts that the end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state;" asserting that the proposition which the eminent domain clause asserts is that "there is some natural and unique set of entitlements that are protected under a system of private property").

21. See FREYFOGEL, *supra* note 17, at 208-09 ("Property draws its philosophic justification from the common good Landowner liberty, accordingly, should be recognized in property law only when it helps promote the common good [P]roperty law is a creation of the majority . . . and should respond to its needs."); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1668-71 (1988) (criticizing natural rights view of property).

22. See FREYFOGEL, *supra* note 17, at 129 ("The value of land today results not just from labors expended on it. Value also comes from what other people have done to surrounding lands; from neighborhoods, communities, and vast cities that have arisen over time. Value comes to a parcel from its proximity to those surrounding improvements, as well as from local scarcities of land generally. Value also comes from nature itself"). A 2007 study done by the Georgetown Environmental Law & Policy Institute found no systematic negative effective of Oregon's land use regulation on the land value of restricted parcels within urban growth boundaries or agricultural lands. GEORGETOWN ENVTL. LAW & POLICY INST., PROPERTY VALUES AND OREGON'S MEASURE 37: EXPOSING THE FALSE PREMISE OF REGULATION'S HARM TO LANDOWNERS 2 (2007), available at <http://www.law.georgetown.edu/gelpi/GELPIMeasure37Report.pdf> (finding no significant difference between land values in Oregon and in neighboring states and noting that "as much as 14% of current agricultural land values in Oregon represents the capitalized value of the state policy of taxing agricultural subsidies at a much lower effective rate than other lands," and that federal agricultural subsidies have also positively affected Oregon agricultural land value).

23. See FREYFOGEL, *supra* note 17, at 177-78 (discussing the "tragedy of fragmentation").

24. See *id.* at 56, 218-19 (discussing property's positive component of protecting landowners' liberty to enjoy healthy landscapes).

compensation due to alleged overregulation.²⁵ Disappointment with the both the federal and state courts' interpretation of takings cases encouraged Oregonians In Action to shift the focus of its attention from the courts to the initiative process. The group's ensuing success not only means dramatic changes in the nature of property rights in Oregon, but elsewhere in states like Arizona that are following the Oregon example.²⁶

This article examines the forces that led to Oregon's Measure 37, analyzes its text, explains its implementation, and considers its underlying libertarian philosophy. Section I begins by describing the history and structure of Oregon's comprehensive land use planning system and pre-Measure 37 citizen initiative challenges to the system. Section II recounts the background of Oregon voters' adoption of Measure 37 as well as its survival in the constitutional challenge that followed. Section III discusses the scope of the measure and early administrative and judicial interpretations of its muddled language. Section IV examines the measure's exceptions and explains how they may affect its scope. Section V surveys the exportation of Measure 37 to other states. Section VI discusses the current state of Measure 37 claims in Oregon and the recent referendum Oregon voters approved as Measure 49, in an effort to minimize those effects. The article concludes that the abstractions and absolutism central to libertarian property make it unsuited to become the dominant property philosophy in the twenty-first century, where context and connection are increasingly paramount considerations in a carbon-limited world that is becoming more obviously interconnected all the time. Viewed in this light, Measure 37 is an unfortunate experiment that ought not to enjoy widespread replication and about which the Oregon electorate has already expressed second thoughts.

I. BACKGROUND: THE OREGON LAND USE PROGRAM

Oregon's comprehensive statewide land use planning system, designed to foster citizen involvement,²⁷ manage population growth,²⁸ pre-

25. One exception is *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071-73 (1992), which equated complete economic wipeouts due to regulations with permanent governmental physical occupations. But there are few such wipeouts, and the *Lucas* Court's exemption for regulations that merely replicate "background principles" of property or nuisance law, has provided government defendants with a significant new defense in takings cases, effectively swallowing the *Lucas* wipeout rule. See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005).

26. See Private Property Rights Protection Act, Ariz. Prop. 207 § 12-1134 (Proposition 207) (2006) (codified at ARIZ. REV. STAT. § 12-1134 (2007)); Ariz. Secretary of State, 2006 General Election Results, <http://www.azsos.gov/results/2006/general/BM207.htm>.

27. The tenets of Oregon's land use planning system are contained in statewide land use planning goals, the first of which requires public bodies "to develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process." Goal 1, Statewide Planning Goals, Oregon Department of Land Conservation and Development, <http://www.oregon.gov/LCD/docs/goals/goal1.pdf> (last visited Nov. 4, 2007); see *infra* note 53 (describing where statewide goals are published).

28. Statewide planning goal 14 requires local governments to establish urban growth boundaries to avoid sprawl, provide for orderly development, and encourage the efficient use of land. Goal

serve agricultural and forest resources,²⁹ and promote economic growth,³⁰ is well known. Since its inception in 1973, the system has engendered both strong praise and strong criticism.³¹ Measure 37 is best understood in the context of this tumultuous history. This section describes the history and structure of Oregon's statewide land use planning system and several pre-Measure 37 citizen initiative attempts to repeal the system.

A. The Structure of Oregon's Land Use Planning System

In the late 1960s and early 1970s, reacting both to concerns about the effects of unregulated growth in Oregon³² and an emerging national interest in land use planning,³³ the Oregon legislature enacted a number of land use and preservation statutes,³⁴ culminating in Senate Bill (S.B.)

14, Statewide Planning Goals, Oregon Department of Land Conservation and Development, <http://www.oregon.gov/LCD/docs/goals/goal14.pdf> (last visited Nov. 4, 2007). Goal 14 is discussed in greater detail *infra* at notes 64-68 and accompanying text.

29. Statewide planning goals 3 and 4 require the preservation of agricultural and forest land, respectively. Goals 3 and 4, Statewide Planning Goals, Oregon Department of Land Conservation and Development, <http://www.oregon.gov/LCD/docs/goals/goal3.pdf> (last visited Nov. 4, 2007), <http://www.oregon.gov/LCD/docs/goals/goal4.pdf> (last visited Nov. 4, 2007). The preservation of agricultural and forest land is discussed in detail *infra* at notes 69-91 and accompanying text.

30. Statewide planning goal 9 requires land use plans to "to provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens." Goal 9, Statewide Planning Goals, Oregon Department of Land Conservation and Development, <http://www.oregon.gov/LCD/docs/goals/goal9.pdf> (last visited Nov. 4, 2007). A persistent criticism levied against Oregon's land use planning system is that it stifles economic development through its emphasis on resource preservation. See, e.g., Steven Geoffrey Gieseler, Leslie Marshall Lewallen & Timothy Sandefur, *Measure 37: Paying People For What We Take*, 36 ENVTL. L. 79, 93 (2006) (arguing that Oregon's land use planning system stifles economic growth); James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations On Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49 (2001) (discussing Oregon land use program's effect on small business development). But see Henry R. Richmond, *Does Oregon's Land Use Program Provide Enough Desirable Land to Attract Needed Industry to Oregon?*, 14 ENVTL. L. 693, 694 (1984) (arguing that land use program accommodates development).

31. See, e.g., LEONARD, *supra* note 5, at 64-66 (discussing early opposition to passage of S.B. 100 and Goal 3); Gordon Oliver & R. Gregory Nokes, *Land-Use Law Showing Its Age*, OREGONIAN, May 31, 1998, at B01 (discussing tumultuous history of Oregon land use law). See generally Conference, *Federal Land Use Planning Conference* (March 20-22, 1975), 5 ENVTL. L. 369, 369-761 (1975) (discussing state and proposed national comprehensive land use planning statutes and presenting a spectrum of contemporary views on the topic).

32. Growth was a pressing issue in Oregon in the late 1960s and 1970s. Rapid, and sometimes feckless, development in three areas of the state—the Willamette Valley, the coast near Lincoln City, and eastern Oregon rangeland—garnered much political and media attention. CHARLES E. LITTLE, *THE NEW OREGON TRAIL: AN ACCOUNT OF THE DEVELOPMENT AND PASSAGE OF STATE LAND-USE LEGISLATION IN OREGON 18-20* (1974); LEONARD, *supra* note 5, at 4-7, 64. A study commissioned by Governor Tom McCall predicted that, without government intervention, urban land in the Willamette Valley would increase by 75 percent or 340,000 acres between 1972 and 2020. KNAPP & NELSON, *supra* note 5, at 18-19. For a list of land use related legislation passed by the 1973 legislature see Sarah Elizabeth Fussner & William S. Wiley, Comment, *Oregon's State Land Use Planning Act – Two Views*, 54 OR. L. REV. 203, 203-04 n.4 (1975).

33. See, e.g., Land Use Policy and Planning Assistance Act, S. 632, 92d Cong. (1972); S. 268, 93d Cong. (1973); Sullivan, *supra* note 6, at 815 (discussing the national interest in land use planning in the early 1970s).

34. These statutes included S.B. 10, 1969 Leg. Assem. (Or. 1969); 1969 Or. Laws 324 (Or. 1969). S.B. 10 was a precursor to Oregon's comprehensive, statewide land use bill. It encouraged comprehensive land use planning by requiring the Governor to impose a comprehensive land use

100, which passed in 1973.³⁵ S.B. 100 became the foundation for Oregon's present statewide comprehensive land use planning regime.

S.B. 100 created a new state agency, the Department of Land Conservation and Development ("DLCD"), directed by a Land Conservation and Development Commission ("LCDC").³⁶ The statute empowered LCDC to create a statewide land use policy and required local governments³⁷ to adopt their own comprehensive land use plans that would im-

plan upon local governments which failed to adopt their own. S.B. 10, 1969 Leg. Assem., § 1 (Or. 1969). The bill required land use plans to incorporate nine goals, including conserving farm land for the production of crops, preserving open space, air, and water quality, and diversifying the economy of the state. S.B. 10, 1969 Leg. Assem., § 3 (Or. 1969). S.B. 10 ultimately failed to achieve its goals, however, due to a lack of standards for evaluating the local governments' comprehensive plans, a lack of effective enforcement mechanisms to ensure that the plans complied with S.B. 10's goals, a lack of coordination of plans between contiguous local governments, and a lack of state funding to local governments to implement the statute. See KNAPP & NELSON, *supra* note 5, at 20-21; LEONARD, *supra* note 5, at 6-7; LITTLE, *supra* note 32, at 10; Sullivan, *supra* note 6, at 814.

35. 1973 Or. Laws 80 (codified as amended at OR. REV. STAT. § 197 (2005)). The legislature's concern about the effects of uncoordinated land use was codified in findings and a policy statement in the statute itself. *Id.* § 197.010; see also 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n, 642 P.2d 1158, 1164-65 (Or. 1982) (discussing S.B. 100's legislative history).

36. LCDC is comprised of seven members appointed by the governor, confirmed by the state Senate, and serving staggered four-year terms. Its members are drawn from geographically diverse regions of the state. 1973 Or. Laws 80, § 5 (codified as amended at OR. REV. STAT. § 197.030 (2005)).

Bill 100 also created a Joint Legislative Committee on Land Use, tasked with overseeing DLCD, keeping the legislature informed of the development of land use goals and guidelines, and making legislative recommendations. 1973 Or. Laws 80, §§ 22-24 (codified as amended at OR. REV. STAT. § 197.125-.135 (2005)). The bill directed the Joint Committee to make recommendations on the "implementation of a program for the compensation by the public to owners of lands . . . for the value of any loss of use of such lands resulting directly from the imposition of any zoning, subdivision or other ordinance or regulation regulating or restricting the use of such lands." 1973 Or. Laws 80, § 24(4). In 1981, this requirement was deleted from the statute. 1981 Or. Laws 748, § 24 (codified at OR. REV. STAT. § 197.135 (2005)); see CITY CLUB OF PORTLAND, *supra* note 8, at 18 (discussing the Joint Committee's efforts); Rebekah R. Cook, *Sustainable Land Use and Measure 37, Incomprehensible, Uncompensable, Unconstitutional: The Fatal Flaws of Measure 37*, 20 J. ENVTL. L. & LITIG. 245, 248-49 (2005) (discussing S.B. 849, a failed proposal by the 1973 legislature to compensate property owners whose use of their property was curtailed by government regulation); David J. Hunnicutt, *Oregon Land-Use Regulation and Ballot Measure 37: Newton's Third Law at Work*, 36 ENVTL. L. 25, 28 (2006) (discussing the Joint Committee's efforts).

37. "Local governments" are cities, counties, state agencies, special districts or other governing bodies that make land use decisions. 1973 Or. Laws 80, § 3 (codified as amended at OR. REV. STAT. § 197.015(14) (2005)).

plement the statewide policy.³⁸ LCDC established the state's land use policy in the form of 19 "goals."³⁹

Local governments had to adopt comprehensive land use plans consistent with the statewide goals within one year of LCDC's promulgation of the goals.⁴⁰ LCDC monitored local governments' comprehensive plans. Initially, local governments were to submit their local plans to the LCDC, which could amend any comprehensive plan not in conformance with the goals, impose its own plan at the local government's expense, or enjoin construction not in conformance with an amended or imposed comprehensive plan.⁴¹ LCDC also had authority to hear petitions by individuals and county governments challenging local land use decisions as inconsistent with the goals, and the agency could issue administrative orders enjoining local government land use decisions which it determined violated the goals.⁴²

In 1977, the legislature established an "acknowledgment" process, under which a local government could petition LCDC to review its land use plan and certify the plan's consistency with the statewide goals.⁴³ Once LCDC acknowledged a local plan, a local government could measure most of its land use decisions against the plan rather than the state-

38. Bill 100 defined comprehensive plan as:

[A] generalized, coordinated land use map and policy statement . . . that interrelates all functional and natural system and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational systems, recreational facilities, and natural resources and air and water quality management programs. "Comprehensive" means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. "General nature" means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is "coordinated" when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. "Land" includes water, both surface and subsurface, and the air.

1973 Or. Laws 80, § 2 (codified at OR. REV. STAT. § 197.015(6) (2005)).

39. 1973 Or. Laws 80, § 11 (codified as amended at OR. REV. STAT. § 197.040 (2005)). The bill required LCDC and DLCD to hold public hearings and appoint a state Citizen Involvement Advisory Committee to insure public participation in the formulation of its land use planning goals. *Id.* §§ 35, 36 (codified as amended at OR. REV. STAT. § 197.235 (2005)). The bill also directed LCDC to "give priority consideration" to eleven areas and activities, mostly focused on preservation of resources like lakes, rivers, estuarine resources, wetlands, floodplains, unique wilderness habitats, coastal headlands and beaches and agricultural land. The 19 goals LCDC promulgated are discussed below. *See infra* notes 53-91 and accompanying text.

40. 1973 Or. Laws 80, §§ 18, 32 (codified as amended at OR. REV. STAT. § 197.250 (2005)). The bill required local plans already in existence to comply with the goals set forth in S.B. 10. *Id.* § 41. As discussed below, local governments took considerably longer than one year to enact their comprehensive land use plans. *See infra* note 44.

41. 1973 Or. Laws 80, §§ 44, 47.

42. 1973 Or. Laws 80, §§ 44, 47, 50-53. The goals provided an independent basis to challenge local governments' land use decisions, giving county governing bodies standing to petition LCDC to challenge local land use plan provisions, ordinances or particular actions. It also authorized individuals with affected interests to petition LCDC to challenge land use plan provisions and ordinances, but not particular land use actions. 1973 Or. Laws 80, § 51. This avenue of review was repealed in 1979 when the legislature enacted the Land Use Board of Appeals, described further *infra* at note 48. *See generally* Sullivan, *supra* note 6, at 817.

43. 1977 Or. Laws 766, § 18 (codified as amended at OR. REV. STAT. § 197.251 (2005)).

wide goals.⁴⁴ To ensure acknowledged plans remained consistent with the statewide goals, the legislature required local governments to submit proposed plan amendments to DLCD and required DLCD to disseminate the proposals to interested parties and advise local governments of concerns about the amendments.⁴⁵ The legislature also required local governments to conduct periodic reviews of their comprehensive plans to ensure that they remained consistent with the goals.⁴⁶ In addition, the statute required LCDC to approve localities' periodic plan review and any amendments needed to bring local plans into compliance with the goals.⁴⁷ To encourage consistent adjudication of disputed land use decisions, the legislature in 1979 created a Land Use Board of Appeals ("LUBA"), a three-member panel appointed by the governor, with jurisdiction to hear virtually all appeals of local land use decisions.⁴⁸

Although nearly every ensuing legislative session has amended the land use planning statute, the basic structure of the system established by

44. See *1000 Friends of Oregon v. Land Conservation & Dev. Comm'n*, 724 P.2d 268, 274-75 (Or. 1986) (describing the process and effect of acknowledgment); KNAPP & NELSON, *supra* note 5, at 34. Prior to state acknowledgment, local governments had to review each local land use action (such as a zoning change) for compliance with the goals and that interpretation was subject to challenge. See, e.g., *South of Sunnyside Neighborhood League v. Bd. of Comm'rs of Clackamas County*, 569 P.2d 1063, 1073 (Or. 1977).

Despite S.B. 100's initial requirement that local governments adopt compliant comprehensive plans within one year of LCDC's promulgation of the statewide goals, the last local comprehensive plan did not receive state acknowledgment until August 7, 1986, some 11 years after goal promulgation. OREGON LAND CONSERVATION AND DEV. COMM'N, 1985-87 BIENNIAL REPORT TO THE LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON 1 (1987). In all, by 1986, LCDC acknowledged some 277 local comprehensive plans: 241 city plans and 36 county plans. *Id.*; see also LEONARD, *supra* note 5, at 34 (describing the reasons for delay in plan acknowledgment, which included the complexity of developing local comprehensive plans, and some local governments' "wait and see" attitude toward implementing comprehensive plans); *1000 Friends of Oregon v. Land Conservation & Dev. Comm'n*, 724 P.2d 268, 274 n.5 (Or. 1986) (noting acknowledgment of last plan, but also the continued litigation about acknowledgment of various other local plans).

45. 1981 Or. Laws 748 (codified as amended at OR. REV. STAT. § 197.610-197.625 (2005)). Unlike LCDC's adjudicative role in periodically reviewing comprehensive plans, DLCD assumes only an advisory role when reviewing amendments to plans between review periods. The statute authorizes DLCD to comment on, but not approve or reject, proposed plan changes. To challenge amendments, DLCD must appeal the amendment to the Land Use Board of Appeals, discussed *infra* at note 48. See *Volny v. City of Bend*, 523 P.3d 768, 773 (Or. Ct. App. 2000) (characterizing DLCD's role as "that of a party in the local government proceedings").

46. 1991 Or. Laws 612 (codified as amended at OR. REV. STAT. § 197.628 - 197.646 (2005)).

47. *Id.*; see *City of West Linn v. Land Conservation and Dev. Comm'n*, 119 P.3d 283, 287-88 (Or. App. 2005) (describing periodic review process in the context of Portland's urban growth boundary).

48. 1979 Or. Laws 772 (codified as amended at OR. REV. STAT. § 197.805-197.810 (2005)). Before the creation of LUBA, parties could seek review of local land use decisions, such as zoning changes, by petitioning for a writ of review or initiating a declaratory judgment action in a circuit court, or by petitioning the LCDC to review the decision and issue an administrative order. 1973 Or. Laws 80, § 51. Now, LUBA has "exclusive jurisdiction to review any land use decision or limited land use decision," a broad grant of jurisdiction which encompasses land use decisions ranging from plan amendments to individual zoning approvals. OR. REV. STAT. § 197.825 (2005). LCDC retains jurisdiction over acknowledgment, periodic review, and approval of exceptions to comprehensive plans. § 825(c). The Court of Appeals hears appeals of LCDC orders and LUBA decisions. OR. REV. STAT. §§ 197.650, 197.850(3)(a) (2005). See generally, Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 WILLAMETTE L. REV. 441, 446-49 (2000) (describing the origins of LUBA).

S.B. 100 has endured. Over thirty years later, local governments continue to promulgate comprehensive plans and make day-to-day land use decisions. The state continues to oversee local government land use decisions by (1) certifying local plans' consistency with the goals;⁴⁹ (2) conducting ongoing review of plans;⁵⁰ (3) advising local governments on and challenging plan amendments;⁵¹ and (4) hearing appeals of most types of disputed local land use actions.⁵²

B. Statewide Land Use Goals

A fundamental goal of the Oregon system is the infusion of statewide goals into local decisionmaking.⁵³ After a series of statewide public hearings,⁵⁴ LCDC initially approved fourteen goals in 1974. Over the next two years, the agency adopted five additional goals.⁵⁵

The goals are in four broad categories: two address the planning process;⁵⁶ seven address conservation;⁵⁷ six address development,⁵⁸ and four address coastal resources.⁵⁹ Although the goals have been periodically amended,⁶⁰ no new goals have been added or deleted since the adoption of Goal 19 in late 1976. LCDC promulgates "guidelines" for each rule, suggesting how local governments may carry out the goals, but the guidelines are not themselves binding.⁶¹

49. OR. REV. STAT. § 197.251 (2005).

50. OR. REV. STAT. § 197.629 (2005).

51. OR. REV. STAT. § 197.615 (2005).

52. § 197.825.

53. OR. REV. STAT. § 197.015(9) (2005). Statewide goals are rules under the state's Administrative Procedure Act. Although the Oregon Administrative Rules contain a list of the goals, the full text of each goal is available only from the LCDC in paper format or at its website. See *Statewide Planning Goals*, Oregon Dep't of Land Conservation & Dev., available at <http://www.oregon.gov/LCDC/goals.html> [hereinafter *Goals*]; see also *1000 Friends of Oregon v. Land Conservation and Dev. Comm'n*, 724 P.2d 268, 274 n.4 (Or. 1986) (noting that full text of the goals and guidelines are not in the Oregon Administrative Rules and appear to be available only from LCDC).

54. The goals addressed: (1) citizen involvement; (2) land use planning processes; (3) agricultural lands; (4) forest lands; (5) open spaces, scenic and historic areas and natural resources; (6) air, water and land resources quality; (7) natural hazards and disasters; (8) recreation; (9) economic development; (10) housing; (11) public facilities and services; (12) transportation; (13) energy conservation; and (14) containment of urban growth. OR. ADMIN. R. 660-015-000 (2006).

55. These five goals addressed: (15) the Willamette River greenway; (16) estuarine resources; (17) coastal shorelands; (18) beaches and dunes; and (19) ocean resources. *Id.*

56. Goals 1 and 2, *Goals*, *supra* note 53.

57. Goals 3-7, 13, 15, *Goals*, *supra* note 53.

58. Goals 8-12, 14, *Goals*, *supra* note 53.

59. Goals 16-19, *Goals*, *supra* note 53.

60. Each time LCDC amends a goal, local governments must bring their plans into compliance with the new goal within one year of its effective date. OR. REV. STAT. § 197.245 (2005).

61. Goal 2, which defines "guidelines," provides that "[a]bove all, guidelines are not intended to be a grant of power to the state to carry out zoning from the state level under the guise of guidelines." Goal 2, *Goals*, *supra* note 53. LCDC also promulgates administrative rules pursuant to the state's Administrative Procedure Act to implement the goals. OR. REV. STAT. § 197.040(1)(b) (2005).

The preservation of agricultural land and natural resources through the containment of growth in urban areas under Goal 14 and the restriction of land uses outside those areas, particularly through Goals 3 and 4, lie at the heart of Oregon's land use system.⁶² They also serve as the focus of critics' objections to the system.⁶³

1. Urban Growth Boundaries

Goal 14 requires each local government "to provide for an orderly and efficient transition from rural to urban land use" by establishing urban growth boundaries.⁶⁴ An urban growth boundary defines the limits of foreseeable urban development.⁶⁵ Land inside the boundary may be developed for urban use;⁶⁶ land outside the boundary must remain rural.⁶⁷

62. LEONARD, *supra* note 5, at 33 (noting that protection of farm and forest land, drawing urban growth boundaries and facilitating development within the urban growth boundaries was at the heart of the land use planning system).

63. See Hunnicutt, *supra* note 36, at 28 (criticizing the comprehensive land use planning and characterizing the system put in place by S.B. 100 as undemocratic because it "stripped local communities of final authority over planning and zoning decisions in their jurisdiction, and transferred that authority to an unelected commission of political appointees of the Oregon governor"). See discussion *infra* notes 92-135 and accompanying text.

64. Goal 14, *Goals*, *supra* note 53. LCDC substantively amended Goal 14 in 1988, 2000, and twice in 2005. See Or. Dep't of Land Conservation and Dev., History of Statutes, Goals & Rules, http://www.oregon.gov/LCD/history_statutes_goals_rules.shtml (last visited Nov. 4, 2007). The 1988 amendment simply included reference to the fact that local governments could now refer to their acknowledged comprehensive plans, rather than to the goals, when making land use decisions. *Id.* The 2000 amendment allowed LCDC to promulgate rules, which it did, providing that Goal 14 does not prevent the siting of single family dwellings on certain land outside of urban growth boundaries zoned primarily for residential use and in an area for which an exception to Goals 3 and 4 has been acknowledged. *Id.*; OR. ADMIN. R. 660-004-0040 (2007). The December 2005 amendment brought the goal in line with legislation allowing certain industrial developments to be sited on rural land, notwithstanding Goal 14. *Id.* The April 2005 amendments substantially reorganized the goal to streamline and clarify the requirements for local governments to amend their urban growth boundaries. See New Goal 14, 2005-2007 Rulemaking, Or. Land Conservation and Dev. Comm'n, available at http://www.oregon.gov/LCD/rulemaking_2005-07.shtml (last visited Nov. 4, 2007).

Goal 14 outlines six criteria that local governments must take into account in establishing, amending, and determining their urban growth boundaries. Local governments must base their urban growth boundary on two demonstrated needs, the need "to accommodate long range urban growth, consistent with a 20-year population forecast" and the need "for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space." Goal 14, *Goals*, *supra* note 53. Local governments must base the location of the boundary on a consideration of: (i) "[e]fficient accommodation of identified land needs"; (ii) "[o]rderly and economic provision of public facilities and services"; (iii) "[c]omparative environmental energy, economic and social consequences"; and (iv) "[c]ompatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the [urban growth boundary]." *Id.*

65. Urban growth boundaries must encompass sufficient land to meet the projected residential, industrial, commercial, and recreational needs of the community for the next 20 years. Goal 14, *Goals*, *supra* note 53.

66. Goal 14 establishes four factors that local governments must consider when developing land within their urban growth boundary: (i) orderly, economic provision for public facilities and services; (ii) availability of sufficient land for the various uses to insure choices in the market place; (iii) LCDC goals or the acknowledged comprehensive plan; and (iv) encouragement of development within urban areas before conversion of urbanizable areas. Goal 14, *Goals*, *supra* note 53.

67. See KNAPP & NELSON, *supra* note 5, at 39-42; Wickersham, *supra* note 7, at 529-32. For a description of the history of urban growth boundaries in Oregon, see LEONARD, *supra* note 5, at 91-124.

Under Goals 3 and 4, local governments classify the great majority of the land outside urban growth boundaries as agricultural or forest land.⁶⁸

2. Agricultural Land

Goal 3 stipulates that “agricultural lands shall be preserved and maintained for farm use.”⁶⁹ The goal defines agricultural land broadly, including all land outside of urban growth boundaries exhibiting certain soil characteristics,⁷⁰ all “other land” suitable for farming,⁷¹ and land not suitable for agriculture but “necessary to permit farm practices to be undertaken on adjacent or nearby lands.”⁷² As originally promulgated in 1974, Goal 3 recognized only a single class of agricultural land, requiring local governments to regulate all agricultural land through exclusive farm use zoning.⁷³

Proponents of urban growth boundaries contend that geographically limiting development not only protects surrounding agricultural and farm land, but also saves significant infrastructure costs. See, e.g. 1000 Friends of Oregon, Questions and Answers About Oregon’s Land Use Program, Section B: Urban Planning (2006), <http://gw.friends.org/resources/qanda2.html> (last visited Nov. 9, 2007). Opponents of urban growth boundaries argue that the boundaries raise the price of housing, encourage overly dense housing patterns, increase traffic congestion, and prevent investment in road and infrastructure expansion. See, e.g., LEONARD, *supra* note 5, at 105; Oregonians In Action, Land Use/Property Rights Concerns of the Oregonians In Action Organizations, <http://oia.org/overview.htm> (last visited Nov. 4, 2007).

68. As of 1995, local governments had classified approximately 96 percent of privately owned land outside urban growth boundaries as either agricultural or forest land. Hunnicutt, *supra* note 36, at 33. The 2002 U.S. Department of Agriculture Census of Agriculture for Oregon reported that over 17 million acres were devoted to farming, of which 54 percent were operated by full-time farmers. U.S. DEP’T OF AGRIC., OREGON STATE AND COUNTY DATA, GEOGRAPHIC AREA SERIES, VOL. 1, PT. 37 6 (June 2004).

69. Goal 3, *Goals*, *supra* note 53.

70. *Id.* Goal 3 defines agricultural by reference to the widely used Soil Capability Classification System of the United States Soil Conservation Service. In western Oregon, land of predominantly Class I, II, III, and IV soils is agricultural land. In eastern Oregon, agricultural land also includes land of predominantly Class V and VI. *Id.*

71. *Id.* Goal 3 defines these “other lands” as “lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climactic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices.” *Id.*

72. *Id.* Goal 3 defines these lands as “lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands.” *Id.* In addition to the inclusion of adjacent and other lands as agricultural land, property rights advocates bemoan Goal 3’s strict geology-based definition of agricultural land, arguing that it does not adequately take into account the economic viability of farming the land and prohibits alternate uses of nonproductive or marginal farm lands. See, e.g., Hunnicutt, *supra* note 36, at 33; Oregonians In Action, *supra* note 67.

73. Prior farm land preservation legislation sought to protect farmland through tax incentives and by permitting, but not requiring, local governments to create exclusive farm use zones. See Caroline E.K. MacLaren, *Oregon at a Crossroads: Where Do We Go from Here?*, 36 ENVTL. L. 53, 59 n.29 (2006) (discussing 1963 Or. Laws 577, which authorized counties to assess a special farm use tax on farmers who used their land exclusively for farming). Goal 3 integrated prior farmland preservation legislation into the statewide comprehensive land use system by requiring exclusive farm use zoning of land classified as agricultural. LEONARD, *supra* note 5, at 66-67; Edward J. Sullivan, *The Greening of the Taxpayer: The Relationship of Farm Zone Taxation in Oregon to Land Use*, 9 WILLAMETTE L. REV. 1, 3 (1973) (critiquing farmland protection prior to comprehensive land use planning).

S.B. 101, passed in conjunction with S.B. 100 during the 1973 state legislative session, reaffirmed and amended the use of exclusive farm use zoning as a means of preserving agricultural land,

By requiring all agricultural land to be zoned for exclusive farm use, Goal 3 severely restricted the siting of dwellings on agricultural land and development of the land for any purpose other than farming.⁷⁴ Almost from its inception, the agricultural land use system generated controversy, drawing criticism for allegedly designating too much land as agricultural land,⁷⁵ for failing to recognize regional differences in land use, for impeding economic development, and for preventing individual landowners from realizing the full value of their property.⁷⁶ In response, LCDC and the legislature amended the agricultural land use system several times.⁷⁷ The number of allowable non-farm uses on agricultural land

announcing a policy that "exclusive farm use zoning . . . substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones." 1973 Or. Laws 503, § 1 (codified at OR. REV. STAT. § 215.243 (2006)); LEONARD, *supra* note 5, at 67 (noting that S.B. 101 "unequivocal" expression of the legislature's commitment to preserve farm land). Goal 3 implemented the policy articulated in S.B. 101 by making exclusive farm use zoning mandatory. For a description of the interaction between the comprehensive land use statute, OR. REV. STAT. § 197, and the farm land preservation provisions of the county planning and zoning statute, OR. REV. STAT. § 215, see *Lane County v. Land Conserv. and Dev. Comm'n*, 942 P.2d 278, 286 (Or. 1997).

74. Goal 3 originally allowed agricultural land to be used for farm uses and a limited number of non-farm uses defined in the exclusive farm zoning statute (e.g. schools, churches, golf courses, commercial power generating facilities, utility facilities, forestry). OR. REV. STAT. § 215.203, 215.213. Originally, only five non-farm uses (schools, churches, public parks, golf courses and utility facilities) were allowed in exclusive farm use zones; however, the legislature has steadily expanded the number of non-farm uses allowed on land in exclusive farm use zones. See Oregon Department of Land Conservation and Development, DLCD Farmland Protection Program, www.oregon.gov/LCD/farmprotprog.shtml (last visited Nov. 4, 2007) [hereinafter Farmland Protection Program] (listing chronology of legislation expanding non-farm uses allowed in exclusive farm use zones). To use land for anything other than the uses permitted by the statute, local governments had to go through the exceptions process created by Goal 2, which limited the situations in which an exception would be granted (e.g., land already "physically developed to an extent that it is no longer available for uses allowed by the applicable goal" qualified for an exception) and required local governments to justify the necessity of the alternative use. Goal 2, *Goals*, *supra* note 53. Many comprehensive plans failed LCDC acknowledgment because they contained improper exceptions to Goal 3. See LEONARD, *supra* note 5, at 70 (stating that improper exceptions to Goal 3 were frequently the grounds upon which LCDC denied acknowledgment).

75. In 1998, some 16 million acres, about 25 percent of the state's land, was zoned for exclusive farm use. Robin Franzen & Brent Hunsberger, *Finding Cures for Growing Pains*, OREGONIAN, Dec. 17, 1998, at C01. A 2002 estimate by the U.S. Department of Agriculture put the number of acres at 17 million. See U.S. DEP'T OF AGRIC., *supra* note 68 at 6.

76. LEONARD, *supra* note 5, at 64-66 (discussing early opposition to passage of S.B. 100 and Goal 3); Gordon Oliver & R. Gregory Nokes, *Land-Use Law Showing Its Age*, OREGONIAN, May 31, 1998, at B01 (discussing tumultuous history of Oregon land use law); Robin Franzen, *Farmland Laws Sowing A Bitter Debate Around Oregon: A Crop of Controversy*, OREGONIAN, Oct. 19, 1998, at A1 (discussing various sides of the debate over the agricultural land system); Robin Franzen & Brent Hunsberger, *Finding Cures for Growing Pains*, OREGONIAN, Dec. 17, 1998, at C01 (discussing various proposals for amending the state land use system to better take into account regional differences and to channel development away from the fertile Willamette valley by easing restrictions on less productive farmland, primarily in eastern part of the state). Others have argued that, because agriculture is one of the top industries in Oregon, preserving agricultural land is vital to the state's economy. See, e.g., Tim Bernasek, *Oregon Agriculture and Land-Use Planning*, 36 ENVTL. L. 165, 166 (2006).

77. LCDC first amended Goal 3 in 1983 to conform with legislation passed that year that instituted a marginal land classification program, whereby local governments were allowed to designate certain lands located in exclusive farm use zones as marginal land and relax the zoning criteria for those lands. See *Lane County*, 942 P.2d at 281 n.3; 1983 Or. Laws 826, § 2.

has steadily increased,⁷⁸ as the legislature and LCDC have developed sub-categories of agricultural land to permit more varied uses of less productive farmland, while restricting uses on the most productive lands.⁷⁹ Despite these added nuances, Goal 3 and the exclusive farm use zone statute continued to generate controversy.⁸⁰

LCDC next amended Goal 3 in 1992 to establish new agricultural land subcategories, including a category of "high-value farmland," for which LCDC established use standards more strict than those under the exclusive farm use zoning statute. History of Statutes, Goals & Rules, Department of Land Conservation and Development, http://www.oregon.gov/LCD/history_statutes_goals_rules.shtml (last visited Nov. 4, 2007). These amendments were prompted by a LCDC-commissioned study which concluded that exclusive farm use zoning was failing to adequately protect commercial farmland. DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, ANALYSIS AND RECOMMENDATIONS OF THE RESULTS AND CONCLUSIONS OF THE FARM AND FOREST RESEARCH PROJECT 1 (1991). The study showed that 75 percent of farms on which new dwellings had been approved had annual farm revenues under \$10,000, suggesting that they were not being used for commercial farming. *Id.*; see also RICHARD BRENNER, FARMLANDS IN 12 OREGON COUNTIES: A STUDY OF COUNTY APPLICATION OF STATE STANDARDS TO PROTECT OREGON FARMLAND (1980) (finding widespread local government approval of land division proposals in violation of Goal 3 and concluding that the land use planning system was not adequately protecting farmland).

In 1993, the legislature entered the fray and enacted House Bill 3661, legislation that replaced LCDC's previous attempts to balance agriculture and development. 1993 Or. Laws 792. The bill expressly rejected and overturned the LCDC amendments to Goal 3. 1993 Or. Laws 792, § 28 (certified as amended at Or. Rev. Stat. § 215.304 (2006)) (providing that any rules inconsistent with the House Bill 3661 to have no legal effect). It sought to balance the protection of the most productive farm- and forest land with the development of less productive land by "providing certain owners of less productive land an opportunity to build a dwelling on their land . . . and limiting the future division of and the siting of dwellings upon the state's more productive resource land." 1993 Or. Laws 792, § 10 (codified as amended at OR. REV. STAT. § 215.700 (2006)). The bill established a "lot of record" provision which allowed local governments to permit dwellings on certain agricultural or forest land that met certain conditions, including that it was acquired by the present owner prior to January 1, 1985. 1993 Or. Laws 792, § 2 (codified as amended at OR. REV. STAT. § 215.705). It also adopted a "high value farmland" category subject to stricter use restrictions. 1993 Or. Laws 792, § 3 (codified as amended at OR. REV. STAT. § 215.710). In response to these legislative enactments, LCDC amended Goal 3 to its present form in 1993.

For a detailed descriptions of the history of agricultural land use amendments, see *Lane County*, 942 P.2d at 281-282; DLCD Farmland Protection Program, *supra* note 74; Sullivan, *supra* note 48, at 456-59; Edward Sullivan, *The Evolving Role of the Comprehensive Plan*, 30 URB. LAW 699, 705-06 (1998); Jeanne S. White, *Beating Plowshares Into Townhomes: The Loss of Farmland and Strategies For Slowing Its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 121 (1998).

78. Permitted non-farm uses now include schools, churches, nonprofit group parks, community centers and also golf courses, personal use airports, wineries, cemeteries and guest ranches. See DLCD Farmland Protection Program, *supra* note 74 (listing the approximately 48 non-farm uses currently permitted on land zoned for exclusive farm use).

79. For example, a "lot of record" provision allowed local governments to permit dwellings on certain agricultural or forest land continuously owned since January 1, 1985. 1993 Or Laws 792, § 2 (codified as amended at OR. REV. STAT. § 215.705 (2005)); OR. ADMIN. R. 660-006-0027(1)(a)-(d) (2007). A "high-value farmland" provision, based on soil classification and existing use, such as the cultivation of certain perennials, limits allowable uses on the most productive farmland. OR. REV. STAT. § 215.710 (2005); OR. ADMIN. R. 660-033-020(8) (2007). In response to a 1983 legislative amendment, the LCDC also enacted a "marginal farmland" provision, allowing local governments to relax zoning criteria on certain less productive farmland. See *Lane County*, 942 P.2d at 281, 281 n.3; 1983 Or. Laws 826, § 2. Only two counties, Lane County and Washington County, elected to participate in the marginal lands program, however, and in 1993, the legislature discontinued the program. LCDC subsequently amended its Goal 3 to reflect this change. See OR. REV. STAT. § 215.213 (2007) (providing that those counties which elected to participate in the marginal lands program, however, were allowed to continue regulating their land under that program); *Lane County*, 942 P.2d at 281-82 (describing legislative history); *supra* note 77. These amendments and

3. Forest Land

Goal 4's purpose is to preserve the state's forest resources by requiring local governments to inventory, designate, and restrictively zone forest lands.⁸¹ The goal defines forest land as "lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested land that maintain soil, air, water and fish and wildlife resources."⁸² Goal 4 limits uses of forest land to (1) uses related to forest operations; (2) conservation of soil, water and air quality, fish and wildlife resources, and appropriate agriculture and recreation; (3) locationally dependent uses, such as communication towers; and (4) dwellings authorized by law.⁸³ DLCD has promulgated regulations implementing the goal that, in conjunction with the state's zoning and forest management statutes,⁸⁴ create a detailed and comprehensive forest land use system with which local governments' plans must comply.⁸⁵

Regulation of forest land, like regulation of agricultural land, has undergone a number of amendments since the initial promulgation of

counter-amendments to the agricultural land management program reflect a sometimes bitter lack of consensus regarding development and use of agricultural land.

80. One particularly controversial regulation criticized by those seeking to use rural land for non-farm uses requires an owner of "high-value farmland" to demonstrate that she generated at least \$80,000 in gross annual farm income from the parcel for two consecutive years, or three of the last five years, before she may site a dwelling on her land. OR. ADMIN. R. 660-033-0135(7) (2007). An owner of other agricultural land must have a parcel of at least 160 acres or must demonstrate that she has generated \$40,000 per year in farm income over the same period before she may build a dwelling on her land. *Id.* 660-033-0135(1)(5). *But see* 1000 FRIENDS OF OREGON, THE TOP TEN THINGS YOU NEED TO KNOW ABOUT THE INCOME TEST FOR FARM DWELLINGS 1, <http://gw.friends.org/issues/downloads/farmincometopten.pdf> (last visited Nov. 5, 2007) (noting that the regulation's \$80,000 gross income requirement translates into approximately \$12,000-\$16,000 in net income, and that the average Oregon farm has gross income of approximately \$224,000).

On the other side, observers have criticized the agricultural land system for failing to adequately protect farmland from development. The Oregon Progress Board, an independent state oversight board which monitors the progress of Oregon's 20-year state vision, awarded the state's protection of agricultural land an "F" in 2001, the last year in which it graded the system. *See* OREGON PROGRESS BOARD, ACHIEVING OREGON THE OREGON SHINES VISION: THE 2001 BENCHMARK PERFORMANCE REPORT 65 (2001); OREGON PROGRESS BOARD, ACHIEVING OREGON THE OREGON SHINES VISION: THE 2005 BENCHMARK PERFORMANCE REPORT 58 (2005), available at <http://www.oregon.gov/DAS/OPB/docs/2005report/05BPR.pdf> (noting a 1.4 percent increase between 1992 and 2005 in agricultural land converted for development, and rating the state's progress in protecting agricultural lands as "unknown"); Nyran Rasche, *Protecting Agricultural Lands in Oregon: An Assessment of the Exclusive Farm Use Zone System*, 77 OR. L. REV. 993, 1004 (1998) (arguing that the legislature needs to strengthen protection of agricultural land in Oregon). According to the Farmland Information Center, between 1992 and 1997, nearly 60,000 acres of agricultural land were converted to development uses in Oregon. Farmland Information Center, Oregon Statistics, www.farmlandinfo.org/agricultural_statistics (last visited Nov. 5, 2007).

81. Goal 4, *Goals*, *supra* note 53; John Shurts, *Goal 4 and Nonforest Uses on Forest Lands*, 19 ENVTL. L. 59 (1988) (describing and critiquing Goal 4).

82. Goal 4, *Goals*, *supra* note 53.

83. *See* OR. ADMIN. R. 660-006-0025 (2007) for a more detailed list of allowable uses on forest land.

84. OR. REV. STAT. §§ 215.700-215.750 (2005).

85. OR. ADMIN. R. 660-006-0000-0060 (2007).

Goal 4.⁸⁶ Perhaps the most significant of these amendments was House Bill 3661, passed in 1993,⁸⁷ which contained clear criteria for the siting of dwellings on forest land.⁸⁸ The 1993 amendment allowed new single-family dwellings on only three types of forest land: (1) “lots-of-record,” (2) large tracts, and (3) “template” tracts.⁸⁹ Although the forest land use, building, and lot size restrictions have drawn less criticism from property rights advocates than the agricultural land use system,⁹⁰ owners of forest land appear to account for many of the early Measure 37 claims.⁹¹

C. Initial Attempts to Repeal the Land Use System

Since its inception, statewide land use planning in Oregon has generated controversy and faced heated opposition.⁹² Support by a majority of the state legislature and the governor’s office, however, prevented any major legislative overhaul of the land use planning system; therefore, citizen initiatives assumed the forefront.⁹³ In 1976, just three years after enactment of S.B. 100, a citizen initiative sought to repeal statewide land

86. The goal was amended in 1983, 1990, 1993 and 1994. History of Statutes, *supra* note 77.

87. 1993 Or. Laws 792 (codified as amended at OR. REV. STAT. § 215.740 (2005)).

88. Prior to the passage of House Bill 3661, LCDC employed a case-by-case approach of defining allowable dwellings on forest land, an approach that some criticized for creating uncertainty and frustrating reasonable investment expectations of landowners. See OREGON DEPARTMENT OF FORESTRY, LAND USE PLANNING HANDBOOK 20-21 [hereinafter HANDBOOK] (2003); Shurts, *supra* note 81, at 59-64 (describing ad hoc approach of LCDC, LUBA, and the courts in determining allowable nonforest uses of forest lands).

89. “Lot of record” dwellings are the same as those permitted on agricultural land. See *supra* note 79. “Large tract” dwellings are permitted on tracts of land of at least 160 acres in western Oregon and at least 240 acres in eastern Oregon. 1973 Or. Laws 792, § 4(2), (3), (5) (codified as amended at OR. REV. STAT. § 215.740 (2005)); OR. ADMIN. R. 660-006-0027(1)(e) (2007). “Template” tracts are small forest land parcels in areas already divided into relatively small parcels and developed with dwellings. 1973 Or. Laws 792, § 4(6), (7), (8) (codified as amended at OR. REV. STAT. § 215.750 (2005)); OR. ADMIN. R. 660-006-0027(1)(f) (2007); see also HANDBOOK, *supra* note 88, at 20-23.

90. But see LEONARD, *supra* note 5, at 83-84 (discussing early opposition to forest land preservation, especially from counties and landowners on the forested fringes of the Willamette Valley, where growth pressures were intense and the allure of profit from the subdivision of forest land great); Shurts, *supra* note 81, at 59-64 (criticizing LCDC, LUBA, and the courts’ failure to establish consistent standards for nonforest uses in forest lands prior to House Bill 3661).

91. Hunnicutt, *supra* note 36, at 29-30 n.17 (stating that vast majority of Measure 37 claims are the result of farm or forest zoning under Goals 3 and 4). One reason the regulation of forest land received less criticism than the regulation of agricultural land may stem from the economic clout of the timber industry in Oregon, which has historically supported forest land use protections. See LEONARD, *supra* note 5, at 83-84. Timber companies, however, were major financial supporters of Measure 37, reportedly to slow future land use restrictions of forest practices. See Michael Milstein, *Forest Owners See Fairer Future in Measure 37*, OREGONIAN, Dec. 22, 2004, at A01.

92. Opposition to land use planning predated S.B. 100. See LEONARD, *supra* note 5, at 35-36 (describing early opposition to land use planning, which sought to restrict the power of county planning authorities and to limit the power of local and state government to interfere in the use of rural lands). Initial opposition to land use planning came from many quarters: people philosophically opposed to land use planning, local officials who objected to state oversight, and individual landowners. *Id.*; see also Gordon Oliver & R. Gregory Nokes, *Land-Use Law Showing Its Age*, OREGONIAN, May 31, 1998, at B01 (discussing tumultuous history of land use law).

93. Sullivan, *supra* note 6, at 819 (discussing legislative amendments to land use laws); EDWARD J. SULLIVAN, OREGON’S MEASURE 37—CRISIS AND OPPORTUNITY FOR PLANNING 3 (2005), available at <http://www.planning.org/PEL/commentary/pdf/Mar05.pdf>.

use planning.⁹⁴ That ballot measure failed by a margin of 57 percent to 43 percent.⁹⁵

Two years later, another citizen initiative would have rescinded LCDC goals, required legislative approval of any newly promulgated goals, and required compensation of private property owners whose property values decreased as a result of regulation.⁹⁶ That measure lost by a margin of 61 percent to 39 percent, losing in thirty-one of thirty-six Oregon counties.⁹⁷ Four years later, in 1982, spurred by a deep economic recession, another citizens' initiative would have repealed statewide land use planning.⁹⁸ That measure lost by a margin of 55 percent to 45 percent, but it passed in twenty-one of thirty-six counties.⁹⁹

94. Oregon Repeals Land Use Planning Coordination Statutes, Ballot Measure 10, (1976), available at <http://bluebook.state.or.us/state/elections/elections19.htm> (last visited November 5, 2007); LEONARD, *supra* note 5, at 35-36; CITY CLUB OF PORTLAND, *supra* note 8, at 19.

95. See Ballot Measure 10, *supra* note 94.

96. Measure 10 of the 1978 ballot proposed a constitutional amendment that purported to keep in place comprehensive land use planning, while abolishing the LCDC and the goals it promulgated. *Id.* Local governments would have still been required to adopt comprehensive land use plans in conformance with the statewide goals. *Id.* However, the legislature, not LCDC, would have to adopt these goals. *Id.* In addition, the measure would have required the legislature to adopt zoning, planning, and notice procedures to be followed by local governments, and required the state to compensate landowners in areas of statewide significance, where the state could regulate land use directly, if the state imposed land use restrictions that adversely affected the value of their land. *Id.*

Proponents of the measure argued that it would restore accountability to the land use planning system by taking statewide planning out of the jurisdiction of an executive agency and placing it in the legislature. *Id.* Opponents argued that the measure was a veiled attempt by real estate interests to abolish statewide comprehensive land use planning by assigning the legislature the impossible task of quickly promulgating land use goals as well as the local notice, zoning and planning procedures that local governments would have to follow. See Office of the Oregon Secretary of State, Election Div., Measure 10, Statements in Opposition, in VOTERS' PAMPHLET 57-65 (1978); see also LEONARD, *supra* note 5, at 35-36; CITY CLUB OF PORTLAND, *supra* note 8, at 19.

97. Oregon Blue Book: Initiative, Referendum and Recall: 1972-1978, <http://bluebook.state.or.us/state/elections/elections19.htm> (last visited Nov. 6, 2007); LEONARD, *supra* note 5, at 36.

98. Measure 6 of the 1982 ballot proposed a statutory amendment abolishing LUBA, LCDC, and DLCD, changing statewide goals from mandatory requirements to merely advisory statements, and completely repealing Oregon Revised Statutes § 197, the land use planning statute. ENDS STATE'S LAND USE PLANNING POWERS IN OREGON, RETAINS LOCAL PLANNING, BALLOT MEASURE 6 (1982). The measure required local governments to establish and maintain master land use plans, but these plans did not have to conform to the statewide goals. In effect, land use planning was to be left entirely to local governments, with the state assuming a purely advisory role. *Id.*

Unlike sponsors of earlier—and later—ballot initiatives to repeal statewide land use planning, Measure 6 supporters did not emphasize private property rights. Instead, they argued that statewide land use created too many bureaucratic hurdles for business, thereby impeding economic development. See Office of the Oregon Secretary of State, Election Div., Measure 6, Arguments in Favor, in VOTERS' PAMPHLET 15-16 (1982). Opponents of the measure, including former Governor McCall, also focused their arguments on economic development. They argued that the measure's loose language would create uncertainty and confusion, which would be even worse for economic development than incremental legislative reform of the system to better accommodate economic development. See Office of the Oregon Secretary of State, Election Div., Measure 6, Arguments in Opposition, in VOTERS' PAMPHLET 17-18 (1982); see also LEONARD, *supra* note 5, at 36-37.

99. Oregon Blue Book: Initiative, Referendum and Recall 1980-1987, <http://bluebook.state.or.us/state/elections/elections20.htm> (last visited Nov. 6, 2007); CITY CLUB OF PORTLAND, *supra* note 8, at 19-20; KNAAP & NELSON, *supra* note 5, at 191.

Nearly a decade and a half later, the 1998 ballot contained two citizen initiatives aimed at curtailing, although not completely repealing, the statewide land use planning system.¹⁰⁰ The first, Measure 56, required the state and local governments to mail notices describing proposed changes to land use laws or regulations to landowners.¹⁰¹ That measure passed by an overwhelming margin of 80 percent to 20 percent.¹⁰² The second initiative, Measure 65, would have amended the state constitution to allow citizens to petition the legislature to review administrative rules with which they disagreed.¹⁰³ Although the scope of Measure 65 encompassed more than just land use regulation, and the measure received support from a variety of interest groups,¹⁰⁴ its drafters designed the measure as a means of challenging LCDC land use regulations that restricted the siting of dwellings on high-value farmland.¹⁰⁵ The measure failed by a narrow margin, 52 percent to 48 percent.¹⁰⁶

A driving force behind both of the 1998 measures was Oregonians In Action, a private property rights and land-use reform advocacy group.¹⁰⁷ The organization presented itself as a counterbalance to pro-

100. Land use was a major issue in the 1998 gubernatorial race. Bill Sizemore, the Republican candidate, campaigned on a platform which emphasized overturning the statewide land use planning system and "returning" land use planning to local communities. Jeff Mapes, *Sizemore Finds Property Owners Open to Message*, OREGONIAN, Apr. 5, 1998, at C12. Sizemore led a ballot initiative which would have repealed the statewide planning system through constitutional amendment, but withdrew the initiative after it had been certified but before it made it onto the ballot. See Oregon Secretary of State, Elections Division, Initiative, Referendum and Referral Search, http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20000004.LSCYYY (last visited Nov. 6, 2007); Robin Franzen, *Farmland Law Sowing a Bitter Debate Around Oregon: A Crop of Controversy: Legacy on the Line*, OREGONIAN, Oct. 19, 1998, at A01.

101. Expands Notice to Landowners Regarding Changes to Oregon Land Use Laws, Ballot Measure 56 (1998) (codified as amended at OR. REV. STAT. § 215.503 (1999)).

102. Official Results, 1998 General Election, State Measure 56, <http://www.sos.state.or.us/elections/nov398/other.info/m56.htm> (last visited Nov. 6, 2007). Although it passed overwhelmingly, some criticized the measure as undermining support for land use planning because of the high cost of sending out the notices—estimated at \$3.5 million per year—that would be borne by LCDC and local governments, and because of the wording of the notices, mandated by the measure, emphasized the potential diminution in property value caused by the proposed land use measure. Editorial, *Let Landowners Know*, OREGONIAN, Oct. 7, 1998, at C12; R. Gregory Nokes, *Ballot Measure Calls for Direct Notification of Land-Use Changes*, OREGONIAN, Sept. 30, 1998, at A14.

103. Amends Oregon Constitution: Creates Process for Requiring Legislature to Review Administrative Rules (Measure 65) (1998), available at <http://www.sos.state.or.us/elections/nov398/guide/measure/m65.htm> (last visited Nov. 6, 2007). The measure would have enabled citizens to challenge any administrative rule issued by a state agency by collecting a requisite number of signatures and petitioning the legislature to approve or disapprove the rule. Under the measure, if the legislature did not act upon receiving such petition during the legislative session following the submission of the petition, the administrative rule would be deemed to have been repealed. *Id.* § 34(3)(a)-(b).

104. R. Gregory Nokes, *Private Property Group Wants Ways to Challenge Administrative Rules*, OREGONIAN, Oct. 13, 1998, at A09 (noting that Oregon Right to Life supported the measure, vowing to petition the legislature to overturn administrative rules supporting doctor-assisted suicide).

105. *Id.* (discussing campaign for the measure).

106. Oregon Blue Book: Initiative, Referendum and Recall 1996-1999, <http://bluebook.state.or.us/state/elections/elections22.htm> (last visited Nov. 6, 2007).

107. Oregonians In Action was founded in the early 1980s by Frank Nims, a former farmer from eastern Oregon. Before transforming itself into a single-issue private property rights organiza-

land use planning groups such as 1000 Friends of Oregon, a watchdog organization formed by former Governor Tom McCall in 1975.¹⁰⁸ Throughout the 1990s, Oregonians In Action gained influence, scoring a major victory representing John and Florence Dolan in their successful challenge to a conditional building permit in *Dolan v. City of Tigard* before the U.S. Supreme Court.¹⁰⁹ The group met with further success in 2000, when it sponsored a citizen initiative amending the state's constitutional takings provision, and the voters approved the measure.¹¹⁰

D. Ballot Measure 7 (2000)

The 2000 initiative—Ballot Measure 7—attempted to amend the Oregon Constitution's takings clause¹¹¹ to require the state or a local government to compensate a landowner for any law or regulation that restricted the use of the owner's land and "ha[d] the effect of reducing the value of a property upon which the restriction is imposed."¹¹² The measure would have required the state or local government to compensate a landowner for any restrictive regulation that was "adopted, first enforced or applied" after the current landowner purchased the property, and that continued to apply 90 days after the owner's application for compensation.¹¹³ The compensation due was 100 percent of the difference be-

tion in 1989, the group championed smaller government, introducing ballot initiatives to reduce pay for legislators, introduce constitutional limits on government spending, disallow voter registration within twenty days of an election and, somewhat bizarrely, prevent teachers from serving in the state legislature. David Hogan, *Land Use Wins Buoy Oregonians In Action*, OREGONIAN, Dec. 25, 2000, at A01; see also Patty Wentz, *This Land is Their Land*, WILLAMETTE WEEK, Nov. 28, 2000, at 21 (discussing origins of Oregonians In Action).

108. Governor McCall founded 1000 Friends of Oregon as a statewide land use planning watchdog group to oversee the implementation of S.B. 100. The group has played a major oversight role in the institution of the statewide land use planning system, reviewing local government comprehensive plans for consistency with statewide goals, working with local governments to improve their land use planning, and challenging planning decisions inconsistent with the goals before LUBA and the state courts. See 1000 Friends of Oregon: History, <http://www.friends.org/about/history.html> (last visited Nov. 6, 2007).

109. 512 U.S. 374 (1994). See generally Colloquium, Dolan: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit*, 25 ENVTL. L. 111 (1995). In 1991, Oregonians In Action established a legal center to represent landowners in test cases at no charge. The group was also successful in lobbying for legislative changes to Oregon's land use. See Hogan, *supra* note 107 (reporting that the state's Republican-controlled legislature enacted 13 pieces of legislation authored by Oregonians In Action into law in 1999).

110. The measure was originally proposed by Bill Sizemore and his Oregon Taxpayers United organization, but Oregonians In Action took over the process of getting the measure approved and campaigning for its adoption by the voters. CITY CLUB OF PORTLAND, *supra* note 8, at 22-23 (describing origin of Measure 7); Hogan, *supra* note 107. Oregonians In Action's political action committees reportedly spent about \$880,000 on Measure 7. *Id.* During its Measure 7 campaign, Oregonians In Action highlighted the stories of sympathetic landowners whose property had allegedly lost value due to land use planning, including Dorothy English, an elderly widow living in north Portland whose story would be used to great effect again in the 2004 Measure 37 campaign. See R. Gregory Nokes, Scott Learn & Harry Esteve, *Property Measure Battles Lie Ahead*, OREGONIAN, Nov. 9, 2000, at C01.

111. OR. CONST. art. 1, § 18.

112. Measure 7, *supra* note 2.

113. *Id.* § (d). The "first enforced or applied" language implied that the measure might have retroactive effect. For instance, a landowner whose land was already subject to a land use restriction

tween the fair market value of the land before and after the application of the regulation, which expressly included “net cost to the landowner of an affirmative obligation to protect, provide, or preserve wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archeological or cultural resources, or low income housing.”¹¹⁴

Measure 7 would not have required the state or local governments to compensate landowners for (1) “historically and commonly recognized nuisance laws,”¹¹⁵ (2) regulations “to implement a requirement of federal law,”¹¹⁶ or (3) “regulations prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor.”¹¹⁷ These exceptions would reappear in Measure 37.

Unlike Measure 37, Measure 7 contained no express provision allowing government to waive a land use regulation rather than pay compensation to a claimant, prompting controversy over whether, and under what circumstances, governments could avoid compensating claimants. The Attorney General interpreted the measure’s requirement of compensation only when a land use regulation “continues to apply to the property ninety days after the owner applies for compensation” to permit gov-

at the time she purchased it might nonetheless be entitled to compensation if neither she nor a previous landowner had ever applied to use the land in a manner prohibited by the land use regulation. See CITY CLUB OF PORTLAND, *supra* note 8, at 26 (noting that land use lawyers interviewed by the City Club expressed their opinion that the measure might have this sort of retroactive effect). But see R. Gregory Nokes, *Judge Blocks Property Measure*, OREGONIAN, Dec. 7, 2000, at A01 (citing an Oregonians In Action lawyer asserting that he did not believe the measure had retroactive effect).

The Oregon Attorney General, in an opinion interpreting Measure 7’s provisions, also concluded that “first enforced or applied” might have retroactive effect. 49 Or. Op. Att’y. Gen. 284 (2001), 2001 Ore. AG LEXIS 3. He stated: “[T]he right to compensation created by Measure 7 applies prospectively, i.e., where the government passes or enforces a regulation after the effective date of Measure 7. Measure 7 does not create a right to compensation if both of those government actions were taken before the Measure’s effective date.” *Id.* at *99. But, “the voters intended the Measure to require compensation for the future (post-Measure 7) enforcement of existing (pre-Measure 7) regulations, where the regulation was ‘adopted, first enforced or applied’ after the owner in question became the owner.” *Id.* at *112.

114. Measure 7, *supra* note 2, at § (e). Other states, notably Florida and Texas, adopted landowner compensation statutes that compensate landowners for loss to property value caused by government action. Florida’s “Bert J. Harris, Jr., Private Property Rights Protection Act” measures compensation due landowners as “compensation for the actual loss to the fair market value of the real property caused by the action of government.” FLA. STAT. § 70.001(2) (2007). Texas’ statute provides for compensation in the amount of “damages suffered by the private real property owner as a result of the [government action],” to be determined by a state court hearing the action. TEX. GOV’T CODE ANN. § 2007.024(b) (2007). However, both of these states’ statutes are triggered only when the decrease in value due to government regulation is substantial (25 percent in Texas, “inordinately burden[some]” in Florida). FLA. STAT. §§ 70.001(2), (3)(e); TEX. GOV’T CODE ANN. § 2007.002(5)(B)(ii). These and other states’ compensation statutes are discussed in more detail *infra* at notes 226, 229.

115. Measure 7, *supra* note 2, at § (b). The measure would have required that these laws “shall be narrowly construed in favor of a finding that just compensation is required under this section.” *Id.*

116. *Id.* § (c). The measure would have required that the state or local government impose these regulations “to the minimum extent required.” *Id.*

117. *Id.*

ernments in some circumstances to waive land use regulations rather than pay compensation.¹¹⁸ He opined that state agencies could waive land use regulations rather than pay compensation when (1) their rules and enabling statutes gave them discretion to do so,¹¹⁹ or (2) they did not have sufficient funds allotted or appropriated to cover the compensation cost.¹²⁰ A number of local governments adopted ordinances in response to Measure 7 which allowed them to waive offending land use laws rather than compensate claimants, although considerable controversy surrounded their authority to do so.¹²¹

118. *Id.* § (d). The Attorney General issued a detailed opinion interpreting Measure 7's provisions, including whether the measure allowed for state agencies to waive rather than compensate. Or. Op. Atty. Gen., *supra* note 113, at *318; *see also* David Steves, *Oregon Attorney General Cites Impact of New Land-Rights Law*, REGISTER-GUARD (Eugene, Or.), Feb. 14, 2001, available at 2001 WLNR 7663828 (citing Attorney General Hardy Myers stating that the opinion was produced by 20 lawyers at the Department of Justice over three months in an attempt to objectively interpret the measure).

119. According to the Attorney General, the measure's 90-day language allowed "[a] state agency [to] forego enforcement of regulations restricting the use of private real property if the agency's rules and enabling statutes give it discretion to do so." Or. Op. Atty. Gen., *supra* note 113, at *11. The Attorney General explained further that:

Because Measure 7 provides that compensation is due only where the regulation 'continues to apply' 90 days after the claim is made, it may be suggested that Measure 7 itself authorizes state agencies to forego enforcement of regulations. However, Measure 7 itself provides no express powers to state agencies and does not authorize agencies to forego enforcement of regulations restricting the use of private real property. Consequently, we must look to existing law to determine whether the agency has the discretion to choose whether or not to enforce the regulation.

Id. at *155.

120. The Attorney General stated:

If a state agency's enabling statutes or rules do not give the agency discretion to forego enforcement of a regulation restricting the use of private real property, the agency must enforce that regulation as long as it has money within its appropriation and allotments to pay valid Measure 7 claims. An agency must include in its allotment estimate an amount for valid Measure 7 claims that will be due in the upcoming allotment period, and DAS must approve an allotment sufficient to pay such claims as long as the agency has appropriated funds available to pay the claims and to carry out the agency's mandatory duties for the remainder of the biennium, even if doing so will require the agency to discontinue or cut back on other statutory, but nonmandatory, activities. If, before the end of the biennium, the agency no longer has sufficient funds to perform all of its mandatory activities, the agency must determine which of its conflicting statutory mandates are primary. In no event, however, may the agency incur obligations in excess of its allotment or appropriation; at that point, the agency would no longer be required to perform its mandatory statutory duties. If the obligation to pay a Measure 7 claim would result in a debt limit violation, not only may the agency no longer enforce the regulation giving rise to the claim, but the statute requiring such regulation would no longer apply; at that point, the statute would cease to have legal force or effect.

Id. at *11-*12; *see also id.* at *162-*172 (discussing in greater detail the Attorney General's opinion as to how agencies must budget for Measure 7 claims and under what circumstances agencies could waive regulations because they lacked funds to cover the compensation costs).

121. *See* CITY CLUB OF PORTLAND, *supra* note 8, at 27 (stating that the intent of the grace period was to allow local government to waive the regulation rather than pay compensation, but noting "significant debate" regarding this point "since the measure does not specifically authorize waiver"); Jeff Barnard, *Oregon Girds for Measure 7 Fallout*, COLUMBIAN (Vancouver, WA), Jan. 28, 2001, at C2 (reporting that numerous cities and counties enacted ordinances allowing them to waive enforcement of regulation rather than compensate Measure 7 claimants); R. Gregory Nokes, *1000 Friends Sues 23 Cities*, OREGONIAN, Dec. 22, 2000, at B01 (discussing an action filed with

Voters adopted Measure 7 in November 2000 by an unofficial margin of 54 percent to 46 percent, approving it in thirty of thirty-six counties.¹²² Led by Oregonians In Action, proponents argued that the measure restored “balance” to the system by “forc[ing] regulators to consider the impacts on property owners of imposing restrictions on the use of property before doing so,”¹²³ and by remedying what they viewed as judicial erosion of the takings clause by the Oregon Supreme Court.¹²⁴ Opponents, including 1000 Friends of Oregon, then-governor John Kitzhaber, and the state treasurer, maintained that the measure would cost the state as much as \$5.4 billion annually and make statewide land use planning impossible.¹²⁵ Despite its potentially high cost and broad fiscal implications, Measure 7 garnered little public attention or debate during the 2000 election.¹²⁶

LUBA by 1000 Friends of Oregon, a group opposed to Measure 7, challenging local governments' authority to waive state land use laws in response to Measure 7 claims).

122. As discussed below, because of the legal challenge to the measure, the election results were never officially certified. Unofficial County Results on Measure 7 as of November 14, 2000, <http://www.orcities.org/Portals/17/A-Z/m7ns022.pdf> (last visited Nov. 6, 2007).

123. See Measure 7, Arguments in Favor, <http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/7fa.htm> (last visited Nov. 6, 2007). Oregonians In Action and its directors accounted for half of the “Arguments in Favor” included in the Measure 7 pamphlet received by voters. There were two filings by Bill Moshofsky, full-time volunteer at Oregonians In Action, on behalf of the Just Compensation for Regulatory Takings Committee, two filings by Larry George, then executive director of Oregonians In Action, on behalf of the Oregon Family Farm PAC, and one filing by Frank Nims, then president of the group, on behalf of Oregonians In Action. *Id.*

Other supporters of the measure included United Oregon Taxpayers, which argued that Measure 7 would more widely spread the property taxes burden and lessen the pressure to increase property taxes on current taxpayers; the Oregon Cattlemen's Association; the Oregon State Grange; and Dan Dolan, of *Dolan v. City of Tigard* fame, who argued that the measure would have saved taxpayers the \$1.5 million for which the City of Tigard ended up settling the Dolans' regulatory takings claim for land valued at \$14,000. *Id.*

124. Hunnicutt, *supra* note 36, at 34-35 (arguing that the Oregon Supreme Court's regulatory takings decisions failed to coherently define factors that should be considered in analyzing a takings claim under the state constitution); see *Dodd v. Hood River County*, 855 P.2d 608, 615 (Or. 1993) (holding that zoning law preventing siting of a dwelling on land purchased for \$33,000 was not a taking because \$10,000 worth of timber was left on the property, since that constituted some substantial beneficial use); *Fifth Ave. Corp. v. Washington County*, 581 P.2d 50, 60 (Or. 1978) (deciding that no taking occurs under the Oregon constitution if the owner retains some substantial use of the property); see also *Cope v. City of Cannon Beach*, 855 P.2d 1083, 1084-86 (Or. 1993) (finding a municipal ordinance prohibiting rental of dwellings in residential areas for less than 14 days at a time not to be a taking under the Fifth Amendment of the U.S. Constitution because the ordinance advanced a legitimate municipal interest and left other economically viable uses of the property); CITY CLUB OF PORTLAND, *supra* note 8, at 16.

125. Measure 7, Arguments in Opposition, <http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/7op.htm> (last visited Nov. 6, 2007). The voters pamphlet included 30 Arguments in Opposition to Measure 7, most emphasizing the measure's vague wording, high cost, and undermining effects on health and safety regulations governing property. *Id.*; see also Editorial, *Vote No on Measure 7*, OREGONIAN, Oct. 9, 2000, at B08.

126. CITY CLUB OF PORTLAND, *supra* note 8, at 23 (noting that Measure 7 did not become a focal issue in the campaign, and that most commentators thought it had little chance of approval); Carl Abbott, Sy Adler & Deborah Howe, *A Quiet Counteroffensive in Land Use Regulation, The Origins and Impact of Oregon's Measure 7*, 14 HOUSING POL'Y DEBATE 383, 389 (2003), available at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1403_abbott.pdf (discussing politics of Measure 7 and its aftermath); Editorial, *The Sleeper*, OREGONIAN, Nov. 2, 2000, at D14; Wentz, *supra* note 107 (commenting on Measure 7's unlikely passage).

After the election, many local governments passed ordinances to implement Measure 7.¹²⁷ But before the measure went into effect, a group of local governments, land use organizations, and individuals challenged its constitutionality in Marion County Circuit Court on a number of grounds,¹²⁸ including the claim that Measure 7 violated the state constitution's "separate vote" provision, which requires that each constitutional amendment be voted on individually.¹²⁹ In December 2000, the plaintiffs won a preliminary injunction, effectively freezing the implementation of Measure 7.¹³⁰ In February 2001, the circuit court granted the plaintiffs' summary judgment motion, declaring Measure 7 invalid because it violated both the state Constitution's "separate vote" and "full text" clauses.¹³¹

The state appealed this decision to the court of appeals, which certified the appeal to the state supreme court, which in turn upheld the circuit court's invalidation of the measure, agreeing that it violated the state constitution's "separate vote" provision.¹³² The supreme court concluded that Measure 7 actually contained two constitutional amendments. The first was an explicit amendment of the state's takings clause.¹³³ The sec-

127. See Nokes, *supra* note 121.

128. Plaintiffs brought their challenge before the Secretary of State had finished the constitutionally required canvassing of the Measure 7 votes, and before the Governor had certified the outcome. OR. CONST. art. XVII, § 1; League of Or. Cities v. Oregon, No. 00-C-20156 1, 2 (Marion County Cir. Ct., Feb. 22, 2001), available at <http://www.orcities.org/AZIndex/tabid/810/ctl/ItemView/mid/1421/categoryid/37/itemtitleid/358/type/a/Default.aspx>. The plaintiffs alleged that Measure 7 had been unconstitutionally enacted in violation of the constitution's "one subject" requirement (OR. CONST. art. IV, § 1(2)(d)), the constitutional prohibition on "revisions" through the initiative process (OR. CONST. art. XVII, § 2), "full text" requirement (OR. CONST. art. IV, § 1(2)(d)) and the "separate vote" requirement (OR. CONST. art. XVII, § 1).

129. OR. CONST. art. XVII, § 1 ("When two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."). Amendments are separate if they are "substantive" and not "closely related." League of Or. Cities v. Oregon, 56 P.3d 892, 904 (Or. 2002) (citing *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998)).

130. *League of Or. Cities*, No. 00-C-20156, at 2.

131. *Id.* at 21. The "full text" clause of the Oregon constitution requires that an initiative petition include the full text of the proposed law or amendment to the constitution. OR. CONST., art. IV, § 1(2)(d). The circuit court concluded that Measure 7 violated the provision because, despite containing the full text of the provisions it proposed to add to the constitution, it did not give notice of the other constitutional and statutory provisions it would substantively modify. *League of Or. Cities*, No. 00-C-20156, at 10-13. For example, the measure changed the definition of "just compensation" to include reasonable attorneys fees and expenses necessary to collect compensation when compensation is not paid within 90 days. The court determined that the new definition significantly affected existing condemnation provisions, and both local ordinances and state statutes which set forth the time frames and processes for condemnation actions would have to be amended. *Id.* at 10. Since "nothing in the text of the measure gives notice to the voters of this direct and substantial change to the constitution," the circuit court concluded that the measure violated the full text clause. *Id.*

132. *League of Or. Cities*, 56 P.3d at 896-97, 911. Because the court found the measure violated the separate vote clause, it did not address whether the measure also violated the full text clause. *Id.* at 897 n.5.

133. Prior to the adoption of Measure 7, the takings provision, OR. CONST. art. I, § 18, required compensation only when a property owner demonstrated that the government regulation deprived the owner of all economically viable use of the property. See *Fifth Ave. Corp. v. Wash. County*, 581 P.2d 50, 60, 63 (Or. 1978); *Dodd v. Hood River County*, 855 P.2d 608, 614-15 (Or. 1993). Measure

ond was an implicit amendment to the Constitution's free speech clause.¹³⁴ The court determined that the amendment of the free speech clause was not "closely related" to the amendment of the takings clause, and therefore Measure 7 violated the separate vote provision of the Oregon Constitution and was invalid.¹³⁵

II. BACKGROUND OF MEASURE 37

Following the Oregon Supreme Court's invalidation of Measure 7 on state constitutional grounds in October 2002, Oregonians In Action repackaged the measure as a proposed statutory amendment and successfully petitioned for its inclusion as Ballot Measure 37 on the 2004 ballot.¹³⁶ The 2004 campaign was even more successful than the Measure 7 campaign had been four years earlier. Voters adopted Measure 37 by a margin of approximately 61 percent to 39 percent, approving it in all but one of Oregon's thirty-six counties.¹³⁷

A. The Measure 37 Campaign

Unlike Measure 7, Measure 37 attracted considerable publicity prior to the 2004 election.¹³⁸ Both proponents and opponents of the measure

7 explicitly amended the takings clause by requiring just compensation for any reduction in the value of private real property resulting from the enforcement of a restrictive regulation enacted or first enforced before a landowner acquired a tract. The measure thus substantively amended the takings clause. *League of Or. Cities*, 56 P.3d at 905-06.

134. The measure implicitly amended the free speech clause, OR. CONST. art. I, § 8, by allowing the state or local governments to deny Measure 37 benefits to landowners engaged in the sale of pornographic material. Measure 7, *supra* note 2, at § (c) ("Nothing in this 2000 Amendment shall require compensation due to a government regulation prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor."). *Id.* The free speech clause provides that "no law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever[.]" OR. CONST. art. I, § 8. The court explained that the constitution's free speech clause not only guarantees that the state will not explicitly target expression, but also that "the state or a local government may not treat those who sell expressive material 'more restrictively' than those who sell other merchandise." *League of Or. Cities*, 56 P.3d at 908 (citing *City of Eugene v. Miller*, 871 P.2d 454 (1994)). Thus, by requiring state and local governments to confer benefits on some landowners whose land they restrictively regulate, but not on other landowners because they are engaged in a constitutionally protected expressive activity, Measure 7 violated the constitution's free speech guarantee. Because Measure 7 required this disparate treatment, it changed the scope of the rights guaranteed under the free speech clause, thus constituting an amendment of Article I, § 8. *League of Or. Cities*, 56 P.3d at 892, 908.

135. *League of Or. Cities*, 56 P.3d at 910-11.

136. Measure 37, *supra* note 1; see Hunnicutt, *supra* note 36, at 41 (stating that drafters of Measure 37 took their cue from the Oregon Supreme Court's invalidation of Measure 7 to draft Measure 37 as a statute rather than a constitutional amendment).

137. Hunnicutt, *supra* note 36, at 41; see also Oregon Secretary of State, General Election Abstract of Votes on State Measure No. 37 (Nov. 2, 2004), <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf> (last visited Nov. 6, 2007).

138. Unlike the 2000 ballot, in which Measure 7 was among a total of 26 citizen measures, the 2004 ballot included only eight citizen measures. Compare Official 2000 General Election Online Voters' Guide, Measures, <http://www.sos.state.or.us/elections/nov72000/meas.htm> (last visited Nov. 6, 2007) with Official 2004 General Election Online Voters' Guide, Measures, <http://www.sos.state.or.us/elections/nov22004/g04abstract.html> (last visited Nov. 6, 2007). But other controversial ballot measures, such as a constitutional amendment banning same-sex marriage, vied with Measure 37 for voter attention. In fact, after the election, the Oregonian ran an editorial by

raised large amounts of funding and waged expensive publicity campaigns in support of their positions.¹³⁹

The Oregon timber industry, which viewed the measure as a means of curbing future state regulation of timber land, was the biggest funder of the campaign in support of Measure 37.¹⁴⁰ Individual landowners and 1000 Friends of Oregon provided the bulk of funding for the campaign against Measure 37.¹⁴¹ The campaign in support raised approximately \$1.2 million,¹⁴² expending approximately \$1 million on media advertisements.¹⁴³ The campaign in opposition raised over twice as much, approximately \$2.7 million,¹⁴⁴ spending approximately \$2 million on media advertisements.¹⁴⁵

its public editor criticizing the paper for failing to adequately focus on Measure 37 in the midst of competing initiatives. See Michael Arrietta-Walden, *The Public Editor, Measure 37 Coverage Was Too Limited, Late*, OREGONIAN, Nov. 14, 2004, at B01 (noting that the paper devoted more coverage to several other measures, including one to ban same-sex marriage and one attempting to dismantle the state accident insurance fund, than it did to Measure 37).

139. Proponents of Measure 37 raised money and campaigned primarily through an organization called the "Family Farm Preservation PAC" (although Oregonians In Action PAC also received contributions, mainly from individuals). See Alex Pulaski, *Election 2004: Measure 37: Property Compensation: Land's Uses, Limits at Stake*, OREGONIAN, Oct. 24, 2004, at D01. Opponents of the measure acted through the "No on 37 Take A Closer Look Committee." See Takings Initiatives, Oregon Opponent Reports, http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=78&Itemid= (last visited Nov. 6, 2007).

140. See Family Farm Preservation PAC, Electronic Filing Report, Cash Contributions, Loans Received and In-Kind, 3-10 (Sept. 23, 2004); Family Farm Preservation PAC, Electronic Filing Report, Cash Contributions, Loans Received and In-Kind, 3-8 (Dec. 1, 2004), available at http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=69&Itemid= (last visited Nov. 6, 2007); Michael Milstein, *Forest Owners See Fairer Future in Measure 37*, OREGONIAN, Dec. 22, 2004, at A01 (stating that the timber industry "supplied almost \$3 of every \$4 that buoyed the ballot initiative to an easy victory"). The Family Farm Preservation PAC also received substantial funding from real estate and development interests. See Pulaski, *supra* note 139, at D01 (noting that contributions from identifiable real estate and development companies accounted for 10 percent of all contributions to the Family Farm Preservation PAC).

141. See No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Contributions, Loans Received and In-Kind, 3-129 (Sept. 23, 2004), available at http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=78&Itemid= (last visited Nov. 6, 2007). 1000 Friends of Oregon contributed approximately \$100,000 to the campaign. *Id.* A single winemaker, Eric D. Lemelson, contributed \$500,500 to the campaign, and his mother contributed another \$85,000. See Janie Har, *Voters Back Beliefs With Bucks*, OREGONIAN, Oct. 23, 2004, at B01.

142. Hunnicut, *supra* note 36, at 39 n.93.

143. George Advertising Inc., was the campaign's media agent. Family Farm Preservation PAC, Electronic Filing Report, Cash Expenditures and Loan Payments, 7-10 (Oct. 21, 2004); Family Farm Preservation PAC, Electronic Filing Report, Supplement to Second Pre-election - Expenditures, 1 (Oct. 29, 2004); Family Farm Preservation PAC, Electronic Filing Report, Cash Expenditures and Loan Payments, 9-11 (Dec. 1, 2004), available at http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=69&Itemid= (last visited Nov. 6, 2007); see also Pulaski, *supra* note 139, at D01 (noting that George Advertising, Inc., was run by Larry George, former executive director of Oregonians In Action).

144. See No to 37 Take A Closer Look Committee, Electronic Filing Report, Summary Statement of Contributions and Expenditures, 1 (June 24, 2005), available at <http://www.takingsinitiatives.org/storage/tmap/documents/Finance%20Filings%202004/Take%20a%20Closer%20Look%20Committee%202005%20Supplemental%20Report.pdf> (last visited Nov. 6, 2007).

145. MacWilliams and Robinson was "Take Closer Look's" media agent. See No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Expenditures and Loan Payments, 130-41

Despite having more money, opponents of Measure 37 were unable to successfully counter the media message of Measure 37 proponents. The pro-Measure 37 campaign focused its argument on fairness and simplicity, concentrating on the theme that government should pay for what it takes.¹⁴⁶ The simplicity of the campaign's message was encapsulated in the measure's ballot title, which proponents succeeded in having the secretary of state approve without opposition: "Government must pay owners, or forgo enforcement, when certain land use restrictions reduce property value."¹⁴⁷ The proponents of Measure 37 were also extremely successful in their radio and television campaign, which spotlighted sympathetic individual land owners, including the elderly and the disabled, whose dreams of developing their land were allegedly thwarted by seemingly extreme or arbitrary government action.¹⁴⁸

(Sept. 23, 2004); No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Expenditures and Loan Payments, 7 (Oct. 18, 2004); No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Expenditures and Loan Payments, 96-100 (Oct. 21, 2004); No on 37 Take A Closer Look Committee, Electronic Filing Report, Supplement to Second Pre-Election – Expenditures, 4 (Oct. 25, 2004); No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Expenditures and Loan Payments, 43-46 (Dec. 2, 2004), available at http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=78&Itemid= (last visited Nov. 6, 2007).

146. Its proponents argued that Measure 37 would provide a simple system for landowners to recover lost property value caused by land use regulation. Instead of having to undertake allegedly costly, time-consuming, and often futile compensation litigation in state courts to seek compensation when government action devalued their land, Measure 37 would allow landowners to simply file a compensation claim with the state or local government, forcing the government to either compensate or waive regulation within a relatively short time. See Official 2004 General Election Online Voters' Guide, Measure 37, Arguments in Favor, <http://www.takingsinitiatives.org/storage/tmap/documents/Measure%2037%20-%20Arguments%20in%20Favor.pdf> (last visited Nov. 6, 2007) [hereinafter 2004 Voters' Pamphlet]; Sullivan, *supra* note 93, at 5-6.

147. Under Oregon law, ballot titles must be filed with the secretary of state and certified by the Attorney General, OR. REV. STAT. § 250.067 (2005), or, if challenged, by the state Supreme Court. § 250.085. Getting a favorable ballot title certified is perhaps the most important element of a citizen initiative campaign, because the title is the only thing that appears on the ballot itself. See Sullivan, *supra* note 93, at 6 (discussing importance of ballot title); Hunnicutt, *supra* note 36, at 41 (same); see also Press Release, Bill Bradbury, Oregon Secretary of State, Certified Ballot Title for Measure 37 (Apr. 22, 2003), <http://www.sos.state.or.us/elections/irr/2004/036cbt.pdf>. In the case of Measure 37, the ballot title was not challenged by opponents. See Sullivan, *supra* note 93, at 6.

148. Sullivan, *supra* note 93, at 6 (pointing out that these images were ones that voters could take with them to the ballot box). One commentator has also argued that, since most voters in 2004 were not Oregon residents when the land use planning system was originally enacted, they had no visceral sense of the state's land use program to counterbalance the pro-Measure 37 campaign's heart-string individual pleas. *Id.*; see also Josh Israel, Takings Initiatives Accountability Project, Ad Wars 2004 (Oct. 3, 2006) [hereinafter Ad Wars 2004], http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=87&Itemid=54 (explaining the media campaign and providing links to the actual television and radio commercials).

The campaign advertisements focused on anecdotal evidence of seemingly arbitrary restrictions placed upon individual landowners (e.g. a \$15,000 citation of a Portland homeowner for cutting down blackberry bushes in her backyard, and ranchers who were allowed to build on their ranch but were required to "move out for four months of the year, so as not to disturb the wildlife"), arguing that government had "found a loophole in the law" and was now "taking private property from Oregonians without compensation." See Ad Wars 2004 ("Yes on 37" Television Ads 1-3).

A majority of the 42 "Arguments in Favor" accompanying Measure 37 in the Voters' Pamphlet were signed by individuals relating their own personal stories, asserting that Measure 37 would restore to them what the government had taken away. See Argument in Favor of Barbara and Eugene Prete, 2004 Voters' Pamphlet, *supra* note 146, at 16-17 (veteran could not build on property

Opponents of Measure 37 stressed a number of arguments, but they failed to settle on a clear, simple message to counterbalance the message of the measure's proponents. The opponents argued that the measure would cost too much to implement,¹⁴⁹ would damage farming in Oregon and the state's quality of life, was poorly drafted and would create uncertainty, and was unfair, treating neighboring property owners disparately, depending on when they had purchased their land. The opponents adopted "Take a Closer Look" as their slogan, and their media campaign focused on drawing voters' attention to the details of the bill in which, they argued, lay dangerous flaws. Television and radio commercials proclaimed, without much explanation, that the measure would "let government change the rules as they went along," which sounded remarkably similar to what proponents of Measure 37 said the measure would remedy.¹⁵⁰

bought for retirement); Argument in Favor of Tim and Casey Heuker, 2004 Voters' Pamphlet, *supra* note 146, at 13-14 (couple unable to rebuild home after fire destroyed it); Argument in Favor of Matt Roloff, 2004 Voters' Pamphlet, *supra* note 146, at 10-11 (former president of Little People of America, unable to run farm as tourist attraction because of competitor's complaints); Argument in Favor of Dorothy English, 2004 Voters' Pamphlet, *supra* note 146, at 3-4 (elderly woman unable to subdivide her property for children and for sale to support retirement).

The 2004 Voters' Pamphlet also included several entries from the chief petitioners for the measure correcting allegedly false statements by the measure's opponents and attempting to explain the intentions behind certain Measure 37 provisions "so to avoid [sic] the courts from misinterpreting our intent behind this measure, as the Oregon courts have a habit of doing." Argument in Favor of Dorothy English, Barbara Prete and Eugene Prete, 2004 Voters' Pamphlet, *supra* note 146, at 29. The pamphlet also included two presumably satirical entries lampooning wildcat developers from southern California and seeking property owners who want to "\$\$\$ Make Money Fast With Measure 37! \$\$\$." Argument in Favor of Peter Bray, 2004 Voters' Pamphlet, *supra* note 146, at 33-35.

149. The estimate of financial impact statement accompanying Measure 37 on the ballot was that the measure would cost between \$64 and \$344 million per year in state and local government administrative expenditures. Official 2004 General Election Online Voters' Guide, Measure 37, Ballot Title, 1, <http://www.takingsinitiatives.org/storage/tmap/documents/Measure%2037%20-%20Ballot%20Title.pdf> (last visited Nov. 6, 2007). The financial impact statement stated that the amount of expenditures needed to pay for compensation claims under the measure could not be determined. *Id.*

150. Ad Wars 2004, *supra* note 148 ("No on 37" Television Ad 1: "Take a Closer Look"). The campaign in opposition to Measure 37 ran ads featuring farmers and scenes of farmland. They stressed that the measure would be costly, unfair, and arbitrary. Nearly every add emphasized the measure's large administrative costs, used catch-phrases such as "higher taxes" and "red tape," and ended by imploring voters to "take a closer look" at the measure, and vote no. The ads lacked the emotional appeal of the proponents ads, in part because the thrust of their message was that when voters more closely and rationally examined the measure, its faults would become apparent. *Id.*; see also Laura Oppenheimer, *Breaking Ground Landowners Who Fought for Measure 37 Ready the First Case*, OREGONIAN, Nov. 22, 2004, at A01 (discussing some of the individuals whose personal stories figured prominently in the Measure 37 campaign). This message was cumbersome in comparison to the proponents' simple invocation of fairness to individual landowners.

The Voters' Pamphlet included 41 "Arguments in Opposition," including submissions by Governor Ted Kulongoski, Oregon's Secretary of State and the state treasurer, former governors Victor Ateyeh and John Kitzhaber, several former Oregon judges, and a number of mayors, as well as conservation groups and agricultural associations. 2004 Voters' Pamphlet, Arguments in Opposition, *supra* note 146, at 1-34. The submissions highlighted the high cost of the measure and the increased tax burdens it would impose, the administrative red tape the measure would create, the poor drafting of the measure, and the importance of protecting farmland. Noticeably absent from the Arguments in Opposition were the human-interest stories employed by the proponents of the measure. *See id.*

B. Measure 37's Provisions

Measure 37 promises to compensate a landowner for any value lost due to regulatory restrictions imposed upon her land after she or a family member acquired the land.¹⁵¹ Like Measure 7, Measure 37 operates retroactively, offering compensation to landowners for past¹⁵² as well as future land use regulations.¹⁵³ In a significant departure from Measure 7, Measure 37 explicitly allows the governing body "responsible for enacting"¹⁵⁴ the regulation to "modify, remove, or not apply" the regulation with respect to a claimant instead of compensating her.¹⁵⁵

An aggrieved landowner must make her claim under Measure 37 by providing written notice to the governing body "enacting or enforcing" the land use regulation.¹⁵⁶ The governing body then has 180 days within which to determine whether the applicant is entitled to compensation or to waive or modify the regulation as applied to the applicant.¹⁵⁷ If the offending regulation continues to apply to the applicant's property 180 days after her application, the applicant has a cause of action for compensation under the measure against the government in the circuit court

151. Section 1 provides, "If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of [Measure 37] that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation." Measure 37, *supra* note 1. Sections 1 and 8, which allow waiver of the regulation in lieu of compensation, are at the heart of Measure 37's promise to landowners. See Hunnicutt, *supra* note 36, at 42.

152. Measure 37, *supra* note 1, at § 1. When government "enforces a land use regulation enacted prior to the effective date of" the measure. *Id.*

153. When government "enacts or enforces a new land use regulation." *Id.* In addition, the measure gives a current owner who acquired property from a member of her family a right to compensation for value lost due to land use restrictions enacted during the tenure of her family's previous ownership of the property. *Id.* § 3(E). Measure 37's retrospective reach far surpasses its predecessor's. Measure 7 provided a right to compensation for value lost to land use laws enacted or enforced after the date of the measure's enactment or land use laws "first enforced or applied" after the measure's passage. Measure 7, *supra* note 2, at § (d). However, the measure contained no provision requiring compensation to current landowners for land use laws enacted during the tenure of their family member's ownership of the property. See *id.* (stating "[c]ompensation shall be due the property owner if the regulation was adopted, first enforced or applied after the current owner of the property became the owner . . ."). Interpreting Measure 7, the Oregon Attorney General further limited the scope of the measure's compensation requirement, concluding "that the voters intended the phrase 'was first . . . enforced or applied after the current owner . . . became the owner' to mean that any action by any government entity as to any property subject to the regulation to carry the regulation into force or effect precludes owners who acquired their property after that action from qualifying for compensation." Or. Op. Att'y. Gen. *supra* note 113, at *1, *118 (emphasis added).

154. Measure 37, *supra* note 1, at § (8).

155. *Id.* § (8), (10). Measure 7 had no express provision allowing government to waive land use restrictions instead of compensating landowners. See *League of Or. Cities v. Oregon*, 56 P.3d 892 (Or. 2002); see also Barnard, *supra* note 121 and accompanying text (discussing lack of a waiver provision in Measure 7); see also *supra* notes 118-20 and accompanying text.

156. Measure 37, *supra* note 1, at § (4), (10) (providing in § 10 that if a claimant does not receive compensation within two years of the date upon which her right to compensation accrued, she shall be entitled to use her property as permitted at the time she (or a family member) acquired it).

157. *Id.* § (4) (intending to provide time for the governing body to evaluate the claim, hold public hearings, and decide upon an appropriate course of action); see also Hunnicutt, *supra* note 36, at 43.

where the property is located.¹⁵⁸ The measure gives a claimant two years from the time an offending land use regulation is passed or is applied to her land to apply for compensation from the regulating entity.¹⁵⁹

The right to compensation created by Measure 37 is extraordinarily broad. First, the measure requires compensation for any regulation that *in any way* diminishes the value of a particular property. On its face, no alleged diminution in value is too small to support a claim. Second, the measure has potentially far-reaching retroactive effect. A present landowner is potentially entitled to compensation for any regulation imposed upon her land after the time she *or a family member* acquired the property.¹⁶⁰ A landowner therefore may reach back generations to determine the date upon which she acquired her property for purposes of asserting a Measure 37 claim. This “inheritance right” could certainly reach back to a time prior to the enactment of Oregon’s statewide comprehensive land use planning system, or indeed to any applicable zoning.¹⁶¹ Third, the

158. Measure 37, *supra* note 1, at § (6) (explicitly providing that an applicant need only file a written application for payment with the relevant governing body and wait 180 days for her cause of action in circuit court to accrue). Although the governing body is free to enact procedures for processing Measure 37 claims, an applicant need not exhaust those procedures, other than by filing a written application for compensation, prior to seeking redress in the circuit courts. *Id.* § (7); *see also* Steven Amick, *Molalla Spells Out Approach to Measure 37*, OREGONIAN, Dec. 10, 2004, at B02 (discussing local Measure 37 ordinance); David R. Anderson, *Council Refines Measure 37 Process*, OREGONIAN, Nov. 24, 2004, at C01 (discussing local Measure 37, including criticism of an ordinance of the city of Beaverton by Measure 37 drafter, David Hunnicutt, because it set a fee of \$1000 for filing Measure 37 claims, which he thought would simply lead claimants to take their claims to court rather than pursue them through the city’s administrative process); Dennis McCarthy, *Happy Valley Sets Flat Fee for Measure 37*, OREGONIAN, Dec. 9, 2004, at D02 (discussing local Measure 37 ordinance); Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 143-44 (2006) (discussing § 7).

The measure also entitles a successful claimant to attorneys’ fees reasonably incurred to collect compensation. Measure 37, *supra* note 1, at § (6).

159. Measure 37, *supra* note 1, at § (5) (setting a two-year statute of limitation for claims based on regulations existing prior to its enactment, but that time does not begin to run until the *later* of the date of Measure 37’s passage, or the date a governing body applies the regulation as approval criteria to an application submitted by the owner of the property. Under this statute of limitation, Measure 37 claims are virtually immortal. For example, a property owner who purchased property in 2005, and who applies for the first time to subdivide her land in 2020, and is denied permission to do so based on a land use ordinance passed in 2006, preventing subdivision, would be entitled to compensation).

160. *Id.* § (3)(E) (exempting from compensation only those regulations “enacted prior to the date of acquisition of the property by the owner *or a family member of the owner* who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.”); *Id.* § (11)(A) (defining family member to “include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing members, or a legal entity owned by any one or combination of these family members or the owner of the property.”). Measure 37’s definition of family member is far more expansive than, for instance, Oregon’s intestacy statute, which does not include in-laws or step-children. *See* OR. REV. STAT. § 112.045 (2005) (establishing inheritance priorities of surviving family); *In re Estate of Reinbrecht*, 240 P. 223, 224 (Or. 1925) (stepchildren not included in inheritance of estate). For a discussion of Measure 37 § 3(E), *see infra* notes 388-400 and accompanying text.

161. A present landowner who bought the property from her stepfather, who had himself purchased it from his father-in-law would presumably be treated as having owned the property from the date her stepgrandfather-in-law purchased the property. *See* MacLaren, *supra* note 73, at 58-59

measure calculates the amount of compensation that is due in a highly speculative manner, which several commentators have criticized for potentially creating large windfall gains for individual claimants.¹⁶²

Measure 37 exempts five categories of land use regulations from its compensation requirement.¹⁶³ First, land use regulations passed before the present owner, or her family, as defined in the measure, acquired the property are exempt from compensation.¹⁶⁴ Second, land use regulations “[r]estricting and prohibiting activities commonly and historically recognized as public nuisances under common law” are exempt.¹⁶⁵ The measure further directs that this exemption “shall be construed narrowly in favor of a finding of compensation under this act.”¹⁶⁶ Third, land use regulations “[r]estricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations” are exempt from compensation.¹⁶⁷ Fourth, “to the extent land use regulation is required to comply with federal law,” it is exempt.¹⁶⁸ Fifth, regulations “[r]estricting or prohibiting the use of the property for the purpose of selling pornography or performing nude dancing,” are also exempt from compensation, provided that the provision is not “intended to affect or alter rights provided by the Oregon or United States Constitutions.”¹⁶⁹ We consider each of these exemptions in section V below.

(noting the high number of potential compensation claims because of the measure’s intergenerational reach).

162. Measure 37 entitles landowners to compensation of 100 percent of the reduction in the fair market value of the affected property interest resulting from the regulation as of the date of the owner’s compensation demand. Measure 37, *supra* note 1, at § (2) (“Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.”). In addition, the measure does not provide any source of funding from which the state or local governments might pay Measure 37 claims. *Id.*

Several commentators have complained about the difficulty of quantifying the effect of land use regulation on a parcel’s value and have argued that the valuation is susceptible to windfall gains for claimants. See Sullivan, *supra* note 158, at 141–42 (discussing the practical difficulties of valuation, and noting the difference between a loss in value caused by land use regulation and a windfall gain that would obtain through a sudden waiver of land use regulation as to a claimant’s parcel while still applying it to neighboring parcels; also citing other critics of the measure’s valuation method); Lauren Sommers, Symposium, *Sustainable Land Use and Measure 37: A Practical Guide to Measure 37*, 20 J. ENVTL. L. & LITIG. 213, 226–28 (2005) (discussing debate over different valuation strategies); see also GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE, *supra* note 22, at 1, 2, 35 (noting value created by tax and other incentives for restricted agricultural land; concluding that the establishment in Oregon of comprehensive land use regulation did not systematically devalue restricted parcels in the state).

163. Measure 37, *supra* note 1, at § (3). Each of these categories is discussed in further detail *infra* Section IV.

164. *Id.* § (3)(E).

165. *Id.* § (3)(A).

166. *Id.*

167. *Id.* § (3)(B).

168. *Id.* § (3)(C).

169. *Id.* § (3)(D).

C. Challenges to Measure 37

Adoption of Measure 37 prompted both court challenges and legislative reaction. In the courts, 1000 Friends of Oregon, several farm bureaus, and individual landowners challenged the measure facially on state and federal constitutional grounds.¹⁷⁰ In 2005, the legislature considered a number of bills, the most significant of which was Senate Bill 1037, which would have substantially amended and clarified the measure.¹⁷¹ Ultimately, as discussed below, both the court challenge and the initial legislative attempts to amend Measure 37 failed.

1. The Oregon Circuit Court Decision

In January 2005, a group of individual landowners, farm bureaus, and 1000 Friends of Oregon challenged Measure 37 on state and federal constitutional grounds in the Marion County Circuit Court against the state Department of Administrative Services, LCDRC, the state Department of Justice, Clackamas County, Marion County, and Washington County.¹⁷² Several parties intervened in support of the state, including the chief Measure 37 petitioners, represented by Oregonians In Action.¹⁷³ In October 2005, the circuit court, per Judge Mary Mertens James, ruled in favor of the plaintiffs on grounds that Measure 37 (1) impermissibly intruded on the plenary power of the legislature;¹⁷⁴ (2) violated several

170. See generally *MacPherson v. Dep't of Admin. Serv.*, No. 05C10444 (Marion County Cir. Ct. Oct. 14, 2005), available at <http://www.ojd.state.or.us/mar/documents/Measure37.pdf>; *MacPherson v. Dep't of Admin. Serv.*, 130 P.3d 308 (Or. 2006). Hector McPherson, the first individual named plaintiff in the challenge to Measure 37, was instrumental in the passage of S.B. 100. A dairy farmer turned state senator, McPherson introduced the bill in the Oregon Senate. See Sullivan, *supra* note 6, at 814-15 (discussing McPherson's central role in the passage of S.B. 100). McPherson framed land use planning in the language of individual rights—planning was needed to protect farmers' rights to farm their land, free from encroaching suburbanites' complaints that the smells and sounds of actual farming were incompatible with their enjoyment of a bucolic life outside the cities in which they worked. See Daniel Brook, *How the West Was Lost*, LEGAL AFFAIRS, Mar./Apr. 2005, available at http://www.legalaffairs.org/issues/March-April-2005/feature_brook_marapr05.msp (discussing McPherson's ability to frame land use planning in terms of personal rights and quoting him as saying, "There are all sorts of things that dairy farmers live with that city folks don't like, namely the odor from the cattle."). Ironically, some thirty years later, Measure 37's proponents would owe much of the success of their campaign to their ability to frame compensation for land use regulation in individual rights terms. See *id.* (discussing the individual rights theme sounded by Measure 37's media campaign).

171. S.B. 1037, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3474, 73d Legis. Assemb., Reg. Sess. (Or. 2005).

172. *MacPherson (No. 05C10444)*, at 1 (Marion County Cir. Ct. Oct. 14, 2005). As discussed below, the plaintiffs claimed Measure 37: (i) impermissibly impaired the legislature's plenary power; (ii) violated the Oregon Constitution's equal privileges and immunities clause; (iii) suspension of laws clause; (iv) sovereign immunity clause; (v) freedom of speech clause; (vi) compensation of religions clause; (vii) separation of powers clause; and (viii) violated the Federal Constitution's Fourteenth Amendment Due Process Clause. *Id.* at 10-22.

173. See *id.* at 1; Ballot Measure 37 Chief Petitioners' Voter Pamphlet Statements, <http://www.measure37.com/why.htm> (last visited Nov. 7, 2007).

174. *MacPherson (No. 05C10444)*, at 10-12 (concluding that Measure 37 impermissibly limited the plenary power of the Oregon legislature, citing the generic rule that a legislature's power to legislate is unfettered unless specifically constrained by the constitution, and determining that the Oregon Constitution contained no provisions permitting either the legislature or the initiative process

provisions of the Oregon Constitution,¹⁷⁵ including equal privileges and immunities,¹⁷⁶ suspension of laws,¹⁷⁷ and separation of powers;¹⁷⁸ and (3) violated both procedural¹⁷⁹ and substantive due process¹⁸⁰ under the Fourteenth Amendment of the U.S. Constitution.¹⁸¹

Perhaps the most interesting aspect of the circuit court's decision was Judge James's determination that Measure 37 violated the equal

to limit the legislature's plenary power to regulate). The court concluded that Measure 37's requirement that the government pay landowners if it wanted to enforce valid, previously enacted, land use regulations amounted to an impermissible limitation of the legislature's plenary power, since the measure forced the government to "pay to govern." *Id.* at 11.

175. *Id.* at 13-16. However, Judge James rejected the plaintiffs' claim that Measure 37 violated the sovereign immunities clause of the Oregon Constitution by making the state liable for the economic consequences of regulation, as she concluded that the state's power to waive its sovereign immunity through legislation is broad enough under article IV, section 24 of the Oregon Constitution to encompass the waiver worked by Measure 37. *Id.* at 16-17. She also determined that that the Plaintiffs' state constitution freedom of speech claim was not justiciable because none of the plaintiffs asserted that they wished to use their property to allow nude dancing or sell pornography, so the provisions of Measure 37 exempting regulations restricting those activities from compensation were not implicated. *Id.* at 17. Even if she were to find that this clause of Measure 37 violated the free speech clause of the Oregon Constitution, Judge James concluded that the only available remedy would be to sever that clause, due to Measure 37's severability provision. *Id.* Finally, the court also concluded that the measure did not violate the compensation to religious institutions clause of the Oregon Constitution because the measure applied to religious institutions as property owners, not in their function as religious institutions. *Id.* at 18.

176. *Id.* at 13 (interpreting article I, § 20 of the Oregon Constitution—which stipulates that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens"—and deciding Measure 37 irrationally distinguished between landowners who acquired their land prior to the enactment of a particular land use regulation (pre-owners), and landowners who acquired their land after its enactment (post-owners), entitling pre-owners, but not post-owners, to compensation for any diminution in the value of their land caused by a land use regulation). The court found that this disparate treatment of pre- and post-owners failed to survive even deferential, rational-basis review. *Id.*

177. *Id.* at 15 (interpreting article I, § 22 of the Oregon Constitution—which stipulates that "[t]he operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly"—and reasoning that, although suspending a law by ballot initiative is not itself impermissible—because the authority of the legislative assembly encompasses citizen initiatives—laws may not be suspended in violation of other constitutional provisions). Since Measure 37 violated the equal privileges and immunities clause by irrationally suspending land use regulations for some property owners but not for others, the court concluded that it also violated the suspension of laws clause, and thus could not delegate that authority to local governments. *Id.* at 16.

178. *Id.* at 18-19 (determining that Measure 37 violated the separation of powers clause because the measure permitted the legislature to delegate to local governments powers that the legislature itself did not have, such as the power to: (1) limit its plenary power; (2) distinguish unequally between two classes in conferring benefits; and (3) suspend the laws).

179. *Id.* at 20 (concluding that Measure 37 violated procedural due process by failing to provide landowners affected by a neighbor's successful Measure 37 claim with a meaningful right to be heard in the process of considering a claim, since such a challenge would be heard only after the state made a determination, which was—according to the court—"too little, too late" because if the state granted a waiver, development of the neighbor's property could begin immediately, and the aggrieved owner would suffer irreparable harm).

180. *Id.* at 22 (deciding that Measure 37 violated affected landowners' substantive due process rights by arbitrarily depriving them of a property interest—which Judge James defined as the loss in value to their property if development is permitted on Measure 37 claimants' property neighboring theirs). Although the affected owners' right to maintain their property value was not a fundamental right requiring heightened judicial scrutiny, the court nonetheless concluded that, since the measure violated equal privileges and immunities, it served no legitimate state ends, thus failing even rational-basis review. *Id.*

181. U.S. CONST. amend. XIV.

privileges and immunities clause by affording disparate treatment to landowners acquiring land prior to enactment of a land use regulation (pre-owners) and those acquiring afterward (post-owners).¹⁸² She thought that these disparities violated the equal privileges and immunities clause because Measure 37's ends were illegitimate and its means were irrational.¹⁸³ According to the court, the measure's purported end—compensating pre-owners for the reduction in the fair market value of their property due to regulation—was illegitimate because it impermissibly limited the legislature's plenary power.¹⁸⁴ Even if the measure's end of compensating landowners for devaluation due to land use regulations was legitimate, however, Judge James concluded that the manner in which the measure awarded compensation did not rationally relate to this end.¹⁸⁵ The court also rejected the state's argument that the distinction between pre- and post-owners was rational because it took into account the fact that post-owners had notice of existing land use restrictions on their land when they purchased it. Judge James considered the allegation that some post-owners received a discount on their property to be "tenuous at best," because, among other things, the distinction failed to account for those who were willing to pay more for the land precisely because it, and surrounding parcels, were subject to land use restrictions, and because the measure gave no relief to those whose land value would be adversely affected by the deregulation of neighboring land through Measure 37 waivers.¹⁸⁶

182. *MacPherson (No. 05C10444)*, at 13. The court decided that the pre and post owner categories were "true classes" for equal privileges and immunities clause analysis, since they were defined by characteristics that are shared and have significance apart from the challenged law, a conclusion with which the Oregon Supreme Court would disagree. See *infra* notes 193-97 and accompanying text.

183. *MacPherson (No. 05C10444)*, 13.

184. *Id.* at 11.

185. The court rejected the rationality of the compensation scheme outright, determining that "permitting pre-owners to recover based on what their properties are worth today, instead of at the time the land use regulations were enacted and the injury to the owners was thus incurred, has no rational relation to the aim of Measure 37 of compensating property owners for the reduced fair market value of their property interest." *Id.* at 14.

The court also concluded that the manner in which the measure disparately compensates differently situated pre-owners was irrational, since it compensates pre-owners who have owned their property for many years more lavishly than it does pre-owners who have owned for a shorter period of time, as the more recent pre-owner will likely have paid more for the property than the older pre-owner. The court thought this bore no rational relationship to the measure's purported ends. *Id.*

186. *Id.*; see also GEORGETOWN ENVTL. L. & POLY INST., *supra* note 22, at 1, 35 (concluding that the establishment in Oregon of urban growth boundaries, and the adoption of restrictions on development in rural areas, did not have a systematically negative influence on the market values of restricted parcels in the state); William K. Jaeger, *The Effects of Land-use Regulations on Property Values*, 36 ENVTL. L. 105, 115 (2006) (discussing empirical studies linking land use regulation to increased property values and explaining in economic terms how the effect of a land-use regulation on property values can be positive or negative, whereas removing a land-use regulation from just one property usually has a positive effect for that one property only).

2. The Oregon Supreme Court Decision

Both the plaintiffs and the defendants appealed the circuit court's order to the Oregon Supreme Court.¹⁸⁷ In a February 2006 decision, the court unanimously reversed the judgment of the circuit court, in a surprisingly unreflective opinion by Chief Justice Paul J. De Muniz.¹⁸⁸ The court concluded that Measure 37 violated no provisions of the Oregon or federal constitutions, and therefore reinstated the measure.¹⁸⁹

Justice De Muniz first rejected the circuit court's conclusion that Measure 37 impermissibly impaired the legislature's plenary power, deciding that Measure 37 was an exercise, rather than a limitation, of that plenary power.¹⁹⁰ Whereas the circuit court thought that Measure 37 placed limits on the legislature's power to regulate, and that such action was impermissible because the constitution authorized no limitation of this plenary power, the supreme court interpreted the measure quite differently: under its reading, Measure 37 authorized state or local entities to decide, in accordance with the measure's provisions, whether to pay just compensation or to modify, remove, or not apply certain land use regulations, which was "an *exercise* of the plenary power, not a *limitation* on it."¹⁹¹ The court concluded that nothing in the state or federal constitutions limited the legislature from exercising its power in this manner; thus, the measure was constitutional.¹⁹²

Justice De Muniz rejected out of hand the circuit court's equal privileges and immunities analysis, maintaining that pre- and post-owners are not "true classes" for purposes of the clause because they do not share characteristics separate from those the challenged law creates.¹⁹³ According to the court, the protections afforded by the equal privileges and immunities clause are available only to "those individuals or groups whom the law classifies according to characteristics that exist apart from the enactment of that challenge."¹⁹⁴ Since the "distinction between pre-

187. Under Oregon's declaratory judgment statute, a judgment holding a ballot measure invalid is appealed directly to the Oregon Supreme Court. OR. REV. STAT. § 250.044(5) (2007); *MacPherson v. Dep't of Admin. Serv.*, 130 P.3d 308, 311 n.3 (Or. 2006). The county defendants did not join the appeal. *Id.* at 312 n.4.

188. *MacPherson*, 130 P.3d 308.

189. *Id.* at 322.

190. *Id.* at 315. Justice De Muniz agreed with the lower court that the legislature, and the people through the initiative process, share the exercise of legislative power, and that power is unfettered unless expressly or implicitly limited by the constitution. *Id.* at 314.

191. *Id.* at 315.

192. *Id.* By defining the measure as an exercise of plenary power, the Oregon Supreme Court essentially concluded that a legislature's plenary power includes the power to impose limits on its ability to control land use to the full extent constitutionally permissible. *See id.* The court also rejected, without analysis, the Plaintiffs' argument that Measure 37 constituted an impermissible contracting away of legislative power. *Id.* at 315 n.8.

193. *Id.* at 316.

194. *Id.* This is so because "every law itself can be said to 'classify' what it covers [as distinct] from what it excludes." *Id.* (quoting *State v. Clark*, 630 P.2d 810, 816 (Or. 1981)). The Oregon Supreme Court cited a number of its precedents that have rejected equal privileges and immunities

owners and postowners . . . is significant only by virtue of Measure 37 itself . . . the date that an owner acquired property has no significance apart from Measure 37.”¹⁹⁵ Measure 37 thus did not classify landowners according to characteristics that existed apart from those it created, so the distinctions that the law itself created were not proper classes for purposes of the equal privileges and immunities clause.¹⁹⁶ With this legal legerdemain, Justice De Muniz concluded that Measure 37 did not violate equal privileges and immunities.¹⁹⁷

The supreme court also rejected the circuit court’s conclusion that Measure 37 worked as a suspension of laws.¹⁹⁸ Relying on the understanding of the word “suspension” contemporaneous with the adoption of the suspension clause in the Oregon Constitution, the court opined that Measure 37 did not “‘cause to cease for a time,’ ‘delay’ or ‘interrupt’ any land use regulation.”¹⁹⁹ Instead, the measure’s authorization to governing bodies to grant waivers of land use regulations under certain conditions simply effectuated “an amendment of the land use regulations in those particulars.”²⁰⁰ Justice De Muniz then pronounced that “no laws

challenges to laws that themselves created the classification. One case rejected a challenge to an Oregon statute capping non-economic damages in wrongful death actions at \$500,000 because “the challenged law itself created the distinction between persons who could receive more than \$500,000 and persons who could not,” and the equal privileges and immunities clause did not bar the legislature from making such distinctions. *Id.* (citing *Greist v. Phillips*, 906 P.2d 789 (Or. 1995)). Similarly, a challenge to the Oregon Tort Claims Act failed because “the alleged disfavored class (victims of government torts) existed as a class only by virtue of the statutory scheme.” *Id.* (citing *Hale v. Port of Portland*, 783 P.2d 506 (Or. 1989), *overruled in part on other grounds by Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001)). Ultimately, the court noted that if the equal privileges and immunities clause were to reach as far as the circuit court decision suggested, laws conferring benefits to Gulf War veterans, for instance, would be subject to challenge by those non-veterans whom the law disfavors. *Smothers*, 23 P.3d at 317. The court thought this to be a nonsensical result. *Id.*

195. *Id.* The court also rejected the plaintiffs’ argument that, even if the class of landowners was not a class independent of Measure 37, the measure still violated the equal privileges and immunities clause because it created a closed or fixed class, pre-owners, who received benefits over all others. Relying on precedent in which the court stated that laws allowing individuals to bring themselves within a favored class do not violate the equal privileges and immunities clause, plaintiffs had argued that the converse must also be true: laws that did not allow for such movement violated the clause. *See id.* at 316. However, the court rejected this argument on the basis that it had previously upheld closed classes as constitutional and claimed that plaintiffs’ argument proved too much—otherwise, the legislature could not establish benefits for, say, veterans of specific wars because non-beneficiaries were precluded from joining that class. *Id.* at 316-17.

196. *Id.*

197. *Id.* The court’s reasoning could produce some absurd conclusions. For instance, this test would uphold against an equal privileges and immunities challenge, a law that prohibits women over 30 from drinking from public water fountains. The characteristic—age—used to distinguish the groups has no significance but for that imbued in it by the statute. Under the court’s reasoning, the classes at issue—women over or under 30—are a creation of the statute itself, have no significance outside the statute, and thus are not a “true class” for equal privileges and immunities purposes. *See id.* at 316.

198. *Id.* at 317.

199. *Id.*

200. *Id.*

are ‘suspended;’ all laws not amended remain in effect,” on the theory that an “amendment” does not amount to a “suspension.”²⁰¹

The court found no separation of powers problems with Measure 37, rejecting the circuit court’s determination that the measure permitted the legislature to delegate to local governments powers that the legislature itself did not possess.²⁰² Since the court had determined that Measure 37 did not violate the equal privileges and immunities and the suspension of the laws clauses, it also concluded that powers delegated by the measure were powers the legislature possessed.²⁰³

The supreme court also reversed the circuit court’s conclusion that Measure 37 violated the federal Constitution’s procedural due process requirements.²⁰⁴ Without deciding whether due process required pre-deprivation hearings for landowners adversely affected by Measure 37 regulatory waivers,²⁰⁵ the court concluded that there were circumstances in which Measure 37 could be applied constitutionally, and that the plaintiffs had thus failed to meet their burden on a facial challenge.²⁰⁶ The court noted that the measure did not prevent pre-deprivation hearings and explicitly authorized local governments to establish procedures to administer the measure.²⁰⁷

Finally, the supreme court rejected the lower court’s conclusion that Measure 37 violated substantive due process, basing its analysis on its

201. *Id.*

202. *Id.* at 318-19.

203. *Id.* at 318. Justice De Muniz also rejected the Plaintiffs’ argument that Measure 37 intruded on the executive power by delegating the enforcement of land use regulations, an executive authority, to legislative bodies, concluding that the waiver of land use regulations was not always an executive action and that, even if it were, Measure 37 vested the power to waive land use laws, in some instances, with the LCDC, an executive agency, and in other instances, with local governments, which are empowered to exercise both executive and legislative functions. *Id.* at 318-19. In addition, the court rejected the Plaintiffs’ argument that Measure 37 failed to provide adequate safeguards to prevent improper use of the power conferred to local governments, concluding that the measure’s grant of a cause of action to claimants seeking compensation was an adequate safeguard against the arbitrary exercise of power by the implementing body. *Id.* at 319.

Like the circuit court, the Oregon Supreme Court rejected the plaintiffs’ argument that because Measure 37 made the state liable for purely consequential economic harm caused by past or prospective legislation, it was an improper waiver of state sovereign immunity. *Id.* at 320 (“Nothing in Article IV, section 24, or, so far as we are aware, in any other state constitutional provision, forbids the state from deciding that it will compensate property owners for the economic consequences of the state’s land use regulations, including waiving the state’s sovereign immunity to permit those owners to assert their claims in court.”)

204. *Id.* at 321.

205. The circuit court had concluded that the measure’s failure to provide pre-deprivation hearings for neighboring landowners adversely affected by the government’s grant of a waiver under the measure to a nearby landowner violated procedural due process. *MacPherson v. Dep’t of Admin. Serv.*, No. 05C104444, at 21 (Marion County Cir. Ct. Oct. 14 2005); *see also supra* note 179.

206. *MacPherson*, 130 P.3d at 321. Because Plaintiffs were facially challenging Measure 37, they bore the burden of showing that the measure could not be constitutionally applied under any circumstances. *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

207. *Id.* The court seemed to leave open the possibility of an as-applied substantive due process challenge by a proximate landowner, where a local government adopted an ordinance that did not provide the proximate landowner with a hearing prior to the grant of a Measure 37 waiver.

earlier conclusion that Measure 37 violated no other provisions of the state constitution; thus, the circuit court's premise in deciding that the measure violated substantive due process was erroneous.²⁰⁸ Justice De Muniz also found no merit in the plaintiffs' argument that Measure 37 violated substantive due process by furthering only a private interest—that of the Measure 37 claimant—instead of a government interest.²⁰⁹ The plaintiffs argued that since Measure 37 granted individuals compensation for economic effects of a regulation that did not amount to a Fifth Amendment taking, the measure amounted a kind of “reverse extortion.”²¹⁰ Justice De Muniz rejected that argument on the ground that, although neither the state nor the federal constitution requires compensation of land use regulations that fall short of takings, neither do they forbid such compensation. Applying the same rational basis review as the circuit court, Justice De Muniz concluded that compensating landowners for losses in property value as a consequence of land use regulation is not irrational.²¹¹ Further, he thought that the means employed by Measure 37 were reasonably related to those rational policy objectives, and thus the measure did not violate substantive due process.²¹²

3. Legislative Amendments

During the 2005 legislative session, both houses of the legislature introduced bills designed to clarify and amend Measure 37.²¹³ The most significant of these proposals was S.B. 1037, the product of months of deliberation within the Senate land-use committee.²¹⁴ S.B. 1037, as amended by the House of Representatives, eventually passed in the Re-

208. *Id.*

209. *Id.* at 321-22.

210. *Id.* at 322.

211. *Id.*

212. *Id.*

213. In addition to S.B. 1037, 73d Legis. Assemb., Reg. Sess. (Or. 2005), discussed below, the legislature introduced bills outlining the procedures to be followed by local governments processing Measure 37 claims. See H.B. 3246, 73rd Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3247, 73rd Legis. Assemb., Reg. Sess. (Or. 2005) (setting forth application requirements); H.B. 3249, 73rd Legis. Assemb., Reg. Sess. (Or. 2005) (requiring local governments to hold public hearings when deciding claims) (allowing local governments to deny a Measure 37 claim where the value lost by the claimant due to the application of a land use rule is less than the value that would be lost by neighbors if that land use rule was waived with respect to the claimant); H.B. 3130, 73rd Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3285, 73rd Legis. Assemb., Reg. Sess. (Or. 2005) (prohibiting property owners from suing local governments for losses incurred as a result of the government's waiver of the land use regulation (ie., H.B. 3120, 73rd Legis. Assemb., Reg. Sess. (Or. 2005))).

One early bill, S.B. 406, 73rd Legis. Assemb., Reg. Sess. (Or. 2005), would have significantly reworked Measure 37 by providing only prospective, but not retrospective, relief to property owners and would have required a land use rule to diminish property value by at least 25 percent (or a combination of land use rules to diminish value by 45 percent) before a compensation claim could accrue. S.B. 406, 73rd Legis. Assemb., Reg. Sess. § 2 (Or. 2005). The bill would have established detailed procedures for processing claims, including various means of funding compensation payments such as through tax relief and the sale of government bonds, and would have established a framework for transferable development credits. S.B. 406 §§ 5, 18.

None of these proposals took flight, however, and each remained in its respective land use committee upon the adjournment of the 2005 legislative session.

214. See Laura Oppenheimer, *Mild Measure 37 Bill Passes*, OREGONIAN, Jul. 8, 2005, at C01.

publican-controlled House but failed in the Democratic-controlled Senate.²¹⁵ S.B. 1037 would have established uniform application and judicial appeals procedures for Measure 37 claims²¹⁶ and clarified which governing bodies had the authority to waive land use rules in response to Measure 37 claims.²¹⁷

S.B. 1037 also would have allowed Measure 37 claimants who obtained waivers of land use rules to transfer those waivers with their property when they sold it.²¹⁸ The waiver transfer provision deeply polarized the legislature and accounted for the party-line voting that ultimately defeated the bill.²¹⁹ Although the 2005 legislature failed to pass legislation clarifying Measure 37, it did pass S.B. 82, which created a ten-member task force charged with evaluating Oregon's land use planning system and issuing an initial report (referred to as the "Big Look") to the legislature in 2007 and a final report in 2009.²²⁰

215. S.B. 1037, 73rd Legis. Assemb., Reg. Sess. (Or. 2005); Laura Oppenheimer & Michelle Cole, *Political Notebook: Senate Rejects Effort to Revise Measure 37*, OREGONIAN, Aug. 4, 2005, at D04.

216. See C-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 2 (Or. 2005) (claims procedure section).

217. See C-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 1.8. The bill authorized state agencies to grant waivers for claims based on state statutes administered by the particular state agency and the Oregon Department of Administrative Services to grant waivers for claims based on all other statutes not administered by a state agency. *Id.*

Earlier versions of the bill included some noteworthy provisions. One provision would have required claimants who received permission to develop their land to reimburse the government for certain tax breaks they had received in the past for maintaining their property as forest, farming or agricultural land. See A-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 28 (Or. 2005). These back-tax assessments could have provided funding enabling local governments to compensate claimants, rather than waive the land use regulations at issue. Earlier versions of the bill also included provisions that would have specified land use rules exempt from Measure 37 claims. See As-introduced S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 3 (Or. 2005) (referring to specific provisions of the land use statutes to which Measure 37 did not apply); Laura Oppenheimer, *Blueprint Drawn for Land-Use Overhaul*, OREGONIAN, May 11, 2005, at A01 (describing original S.B. 1037 proposal).

218. C-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 2.12 (Or. 2005) (waivers granted pursuant to Measure 37 "(a) are uses allowed outright; (b) run with the land; and (c) may be transferred freely by the owner to the owner's successors in interest"). Earlier versions of the bill provided that if successful claimants or their successors in interest did not act pursuant to the waiver within ten years after it was granted, the waiver expired. See A-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 6.12 (Or. 2005) ("[I]f a public entity decides to waive one or more land use regulations in lieu of paying compensation, the waiver expires 10 years after the date of the final decision, unless the proposed use identified in the demand is substantially implemented within the 10-year period.").

219. See Oppenheimer, *supra* note 215, at D04 (noting that the vote on S.B. 1037 fell along party lines, with Republicans voting for, and Democrats voting against, and citing Democrats as saying that the bill's mechanical improvements to the Measure 37 claims process were not worth opening the door to widespread development); Laura Oppenheimer, *Property Rights Compromise Bill is Expected to Die in the State Senate*, OREGONIAN, Aug. 3, 2005, at B09 (stating that "ayes and nays rode largely on one provision: allowing successful claimants to pass on new building opportunities for as long as 10 years when they sell their land."); Laura Oppenheimer, *Kulongoski Deals on Property Rights*, OREGONIAN, July 30, 2005, at D01 (discussing the polarized fighting over the issue of allowing building opportunities to be transferred without also limiting the scope of construction or creating a way to compensate adversely affected property owners).

220. S.B. 82, 73rd Legis. Assemb., Reg. Sess. (Or. 2005); see also Press Release, State of Oregon Governor's Office, State Appoints Oregon Task Force on Land Use Planning (Jan. 26,

More substantive legislative amendments occurred in the 2007 legislature. One measure extended the time during which governments must process Measure 37 claims.²²¹ Another referred a comprehensive set of amendments to the Oregon voters that would offer greater certainty to claimants while imposing limits on the number of claims.²²² These developments are discussed in section VI.

III. INTERPRETING AND IMPLEMENTING MEASURE 37

Because the 2005 legislature was unable to pass legislation addressing the many questions raised by the measure, and because court challenges delayed its implementation, Measure 37's scope remains largely undefined.²²³ Oregon courts and the state Attorney General have addressed some questions, such as the transferability of waivers granted pursuant to the measure. However, these and many other issues have not yet been fully resolved. This section addresses questions surrounding the interpretation and implementation of the measure, focusing on (1) the scope of the measure, (2) how to value claims under the measure, and (3) the nature, transferability, and source of land use waivers granted under the measure.

A. *The Scope of the Measure*

Measure 37 creates a radically far-reaching right to compensation, subject to potentially broad exceptions.²²⁴ At its core, the measure promises compensation for any land use regulation passed after a landowner, or a member of the landowner's family, acquires property that in *any way* diminishes the value of the property.²²⁵ This right to compensation is broader than that in any other state, except Arizona, that has adopted a statute compensating landowners who suffer financial losses due to land use regulation.²²⁶

2006), http://www.oregon.gov/LCD/docs/30_year_review/land_use_task_force_press_release_012606.pdf (describing members jointly appointed to the task force by the Governor, Senate President and Speaker of the House). See generally MacLaren, *supra* note 161, at 64-65, 76-77 (lamenting the lack of funding for the task force and recommending how task force should focus its assessment of the land use system).

221. See *infra* notes 460-65 and accompanying text.

222. See *infra* notes 468-94 and accompanying text.

223. Unlike the 2005 legislative session, in which the House was controlled by Republicans and the Senate and Governorship by Democrats, the 2007 Senate, House and Governorship were all Democratic controlled. The 2007 legislature's attempts to address Measure 37 are addressed *infra* Part VI.

224. Measure 37's exceptions are discussed *infra* Part IV.

225. Measure 37, *supra* note 1, at § 1.

226. Louisiana, Mississippi, Texas, Arizona and Florida have adopted landowner compensation laws—Mississippi in 1994, Louisiana, Texas and Florida in 1995, and Arizona in 2006. The Louisiana and Mississippi compensation laws apply only to regulations of agricultural and forest land and were passed to protect farming and forestry. See MISSISSIPPI PRACTICE ENCYCLOPEDIA § 63:43 (noting that the purpose of the Mississippi legislation was to protect landowners from government regulation impeding their ability to forest and farm). In Louisiana, the government must compensate landowners if the loss in property value due to regulation is 20 percent or more. LA. REV. STAT.

Measure 37 is not simply prospective—it compensates owners for regulations passed prior to the effective date of the measure but after the owner, or a member of her family, acquired her property.²²⁷ This retroactivity is also far out of line with other states' compensation provisions.²²⁸ Although Measure 37 promises to grant landowners an expansive new property right, its language is rife with ambiguity, and the land use laws expressly exempted from its compensation requirement are potentially far-reaching. Ultimately, the scope of the measure will hinge on how courts and the legislature interpret or amend these ambiguities, and how expansively they read its exceptions.

B. Measure 37's Ambiguous Compensation Provisions

Measure 37 provides little guidance as to how state and local governments are to implement its compensation mandate. In Oregon, the state, through LCDC, promulgates land use goals.²²⁹ Local governments implement and enforce these goals by adopting comprehensive land use plans and ordinances in conformance with the statewide goals.²³⁰ Under this system, many local land use limitations are the result of state statutes and regulations; in many cases, local governments are merely enforcing state requirements.²³¹

ANN. §§ 3:3602(11), 3:3610, 3:3622(6), 3:3623 (2007). In Mississippi, government must compensate for a 40 percent or greater loss of value. *See* MISS. CODE ANN. §§ 49-33-3, 49-33-13 (2007). Texas requires compensation for regulations that devalue land by 25 percent or more, generally does not apply to municipal actions, and excludes a number of government actions, including actions taken to fulfill obligations mandated by state or federal law and actions taken to protect public health and safety. TEX. GOV'T CODE ANN. §§ 2007.002(5), 2007.003; 2007.022-024 (2007); *see also* McMillan v. Northwest Harris County Mun. Utility Dist. No. 24, 988 S.W.2d 337, 339-42 (Tex. App. 1999) (interpreting the compensation exception for government actions mandated by state law). Florida's law compensates landowners when a land use regulation "inordinately burden[s] an existing use of real property." FLA. STAT. ANN. § 70.001(2) (2007). Only Arizona's newly adopted ballot measure, Proposition 207, mirrors Measure 37 in compensating landowners for any reduction in property value due to regulation without a minimum threshold. *See* Ariz. Prop. 207 § 12-1134 (Ariz. 2006). *See generally* George Charles Homsy, *The Land Use Planning Impacts of Moving "Partial Takings" from Political Theory to Legal Reality*, 37 URB. LAW. 269, 278-81, 285-97 (2005) (discussing state compensation laws generally, focusing specifically on the effects of Florida's law).

227. *See* Measure 37, *supra* note 1, § 3(E); *supra* note 160.

228. For example, both Arizona's Proposition 207 and Florida's compensation law expressly exclude land use laws enacted prior to the adoption of those measures. Prop. 207 § 12-1134(B)(7) (Az. 2006); FLA. STAT. ANN. § 70.001(12) (West 2007). The compensation laws of Texas, Louisiana and Mississippi have no such exclusion, and may apply retroactively when a government body enforces previously unenforced law enacted prior to the measure. *See, e.g.*, TEX. GOV'T CODE ANN. §§ 2007.003(a)(4) (Vernon 2007) (providing that the compensation statute is triggered by enforcement of regulations). None of these statutes, however, back-dates a landowner's acquisition of her property to the time when a family member acquired the parcel. Unlike Measure 37, then, these states' provisions do not appear to require compensation for laws passed generations before the present landowner acquired her property.

229. *See generally supra* notes 32-52 and accompanying text (describing structure of Oregon land use system).

230. *See, e.g.*, OR. REV. STAT. § 197.646 (2005) (requiring local government to amend its comprehensive plan and land use regulations to implement new land use statutes and LCDC land use goals and rules).

231. *See supra* notes 32-52 and accompanying text.

In the face of this multi-tiered system, Measure 37 leaves ambiguous just which entity must compensate landowners for land use regulations that devalue their property. Section 1 of the measure provides that “a public entity that enacts or enforces” a land use regulation that reduces land value must compensate landowners for the reduction in the value of their land.²³² This language implies that claimants can seek compensation from *either* the government entity enforcing the measure *or* the government entity enacting the measure. In many instances, then, an aggrieved landowner may be entitled to compensation from either the state, which enacted the requirement, or the local government, which enforced it.²³³

How to administer a system in which claimants can seek compensation for the same regulation from either the state *or* the local government has led to vigorous debate but no clear answers. Oregonians In Action, for instance, recommends that Measure 37 claimants, “to be safe,” file their claims with both the local government responsible for enacting or enforcing the land use regulation and the state because “most county land use regulations are the result of statutes and administrative rules passed by the state legislature and state agencies.”²³⁴ The state, on the other hand, maintains that the entity enforcing the land use regulation (usually the local government) is liable for any compensation payments, and that enforcement of a land use regulation by a local government, even if that regulation is one enacted by the state rather than the local government, does not give rise to state liability for compensation.²³⁵ In the failed S.B.

232. Measure 37, *supra* note 1, at § 1.

233. According to Oregonians In Action, for example,

[I]t is not always clear who is responsible for the land use regulations that have taken away your property rights. Sometimes the local government is enforcing its own law that is not required by the state. Sometimes the local government has adopted an ordinance because it was ordered to do so by the state. Sometime both state and local government laws operate independently of each other, and both reduce the use and enjoyment of your property.

Oregonians In Action, Ballot Measure 37, Frequently Asked Questions, <http://measure37.com/faq.htm> (last visited Nov. 7, 2007).

234. *Id.* Implied in this recommendation is the position that both state and local governments may be liable to pay compensation for laws they enact and for laws they simply enforce and, presumably, for laws enacted by the state and enforced by the local government. Ultimately, Oregonians In Action's point is that some entity is liable, so claimants should make their compensation applications to all that might possibly be involved in the land use regulation for which they seek compensation. It is then the government's task to sort out which entity must pay. *See id.*

235. According to the state, “[g]enerally, the public entity enforcing the law is responsible for paying compensation regardless of whether the law is state or local.” Governor Theodore R. Kulon-goski, 2004 Oregon Ballot Measure 37, Initial Questions and Answers 2 (2005), *available at* <http://www.oregon.gov/LCD/docs/measure37/m37qanda.pdf>. Where a local government enforces a state law enacted prior to the effective date of Measure 37 (December 2, 2004), the local government has no right of indemnity from the state for any Measure 37 liability it incurs. *Id.* While the same is true when a local government enforces a state law passed after the effective date of Measure 37, Article XI, § 15 of the Oregon Constitution, which obligates the state government to compensate local governments for the costs of implementing programs the state imposes upon them, may require to the state to indemnify local governments for usual and reasonable costs of enforcing newly promulgated state land use laws. *Id.*

1037, the 2005 legislature attempted to address which government entities were empowered to grant land use waivers, but it steered clear of defining which entity was responsible for paying compensation for particular land use regulations.²³⁶

In addition to its ambiguity about which entity has jurisdiction to grant compensation or waivers, Measure 37 provides no instruction as to how government bodies are to calculate the diminishment in property value caused by a land use regulation. Section 2 of the measure defines the “just compensation” due a landowner as that which is “equal to the reduction in the fair market value of the affected property interest resulting from the enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation.”²³⁷ Of course, there are many possible ways to measure a reduction in fair market value,²³⁸ however, neither the courts nor the legislature has addressed

The state also contends that enforcement of state statutes by local governments triggers no Measure 37 liability for the state. *Id.* The state reaches this conclusion by interpreting § 1 of Measure 37, which provides that relief is available when a “public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date” of Measure 37. *Id.* For existing laws, only the public entity enforcing the regulation is liable under Measure 37, according to the state. For new laws, the state is liable only for the *enactment* of the law, not for its enforcement. Thus, local government *enforcement* of the law does not give rise to state liability, since all the state has done is *enact* the law, and enforcement and enactment are different, separately enumerated actions in Measure 37. *Id.* (“If the state enacted the new law, it may be liable for its act of having enacted the law, but not as a result of the action of the local government to enforce it.”)

236. See S.B. 1037, 73d Leg. Assem., Reg. Sess. § 5.1 (Or. 2005). As described above at note 217, § 1.8 of the bill would have clarified which government entities could grant waivers. But the bill’s only clue as to which entities were responsible for compensation payments was in section 5.1’s instruction that claimants file compensation claims against the state with the Oregon Department of Administrative Services and claims against local government with the chief administrative officer of the local government. *Id.*

237. Measure 37, *supra* note 1, at § 2.

238. See, e.g., Jaeger, *supra* note 186, at 126-27 (discussing valuation methodologies); Sommers, *supra* note 162, at 225-28.

One method of compensating landowners would be to pay them the difference between what their land is worth on the market without the land use regulation in question, and what the land is worth with the regulation still in place, measured at the time the landowner makes her Measure 37 claim. However, as William Jaeger points out, this method may create a windfall for the claimant by overvaluing the land at issue by including in the calculation the value created by one landowner’s right to use her land in a manner unavailable to other landowners. According to Jaeger, “the reduction in market value resulting from a land-use regulation is a fundamentally different concept than the value of an individual exemption to the regulation,” and any attempt at determining the true value of the former must correctly distinguish “the dollar amount attributable to the reduction in value for the land subject to the regulation . . . from the increase in value for non-regulated lands.” Jaeger, *supra* note 186, at 121.

Another method of valuation would calculate compensation as the value lost at the time the land use regulation came into effect, and then provide a rate of return on that amount up to the date upon which the claimant made her Measure 37 claim. Memorandum from Timothy J. Sercombe on the Meaning of “Just Compensation” under ORS 197.352(2) and Modification to Robert E. Stacey, Jr. 18-19 (June 15, 2006) (on file with authors). Under this method, a landowner whose land was down-zoned in, say 1990, would be entitled to the difference between the fair market value of the land prior to the zoning change and the fair market value of the land after the zoning restriction, both measured at the time the land use regulation was passed, here 1990. That amount would then be multiplied by a reasonable rate of return, say five percent, up to the time at which the landowner made her Measure 37 claim, and the landowner would be due the aggregate of the return on investment and the amount of devaluation at the time the land use regulation was passed. *Id.*

the issue.²³⁹ Finally, the measure creates no mechanism for funding the compensation payments it authorizes, effectively guaranteeing that the applicable government will choose to “modify, remove, or not to apply the land use regulation” in lieu of compensating a successful claimant.²⁴⁰

C. Ambiguities in Measure 37’s Waiver Provisions

Unlike Measure 7, which did not include an express waiver provision, Measure 37 explicitly allows governments to waive offending land use laws in lieu of compensating claimants.²⁴¹ Measure 37’s waiver²⁴² provision raises a host of uncertainties, most of them due to the measure’s ambiguous language. An initial uncertainty concerns which entity has the authority to waive a land use regulation. As discussed above, section 1 of the measure requires any public entity that “enacts or enforces” a land use regulation to compensate the landowner for the diminishment in property value caused by the regulation.²⁴³ In lieu of compensation, however, the measure allows the governing body to waive the regulation. Confusingly, this waiver option appears in two separate provisions of the measure, in both sections 8 and 10.²⁴⁴ Section 8 states that the waiver must be obtained from the government body *enacting* the

239. A recent study spotlights the complexity of and controversy surrounding determinations of whether, and how, land use restrictions influence property values. GEORGETOWN ENVTL. LAW & POLICY INST., *supra* note 22, at 1 (“[T]he establishment [in Oregon] of . . . urban growth boundar[ies], and the adoption of . . . restrictions on development in rural areas, [had no] systematic negative influence on the market values of restricted parcels [in the state].”).

240. Measure 37, *supra* note 1, at § 8. Indeed, as of July 18, 2007 the press had only reported one instance in which government proposed compensating a Measure 37 claimant rather than waiving the land use regulation with respect to her property. See Matthew Preusch, *Prineville Offers Measure 37 Pay*, OREGONIAN, Oct. 26, 2006, at A01 (reporting that Prineville was the first city “to decide to pay cash to offset the devaluation of private property because of development restrictions” rather than waive the restrictions in response to a Measure 37 claim); *Measure 37*, OREGONIAN, Dec. 3, 2006, at A15 (noting that Prineville offer was “Oregon’s only compensation offer” for a Measure 37 claim).

241. Measure 37, *supra* note 1, at §§ 8, 10. For a discussion of the uncertainty created by Measure 7’s lack of a waiver provision, see *supra* notes 118-21 and accompanying text.

242. Oregonians In Action objects to the term “waiver” to describe Measure 37’s provision allowing governments to “modify, remove, or not to apply a land use regulation.” Measure 37, *supra* note 1, at § 8. In a question and answer publication on its website, the group stated that “government officials, government lawyers, and anti-property rights advocates immediately began using the term ‘waiver,’ as a derogatory reference to the action taken by the state or local government to restore [a landowner’s] rights.” Oregonians In Action, Ballot Measure 37 Frequently Asked Questions, Question No. 6, <http://measure37.com/measure%2037/faq.htm#5> (last visited Nov. 8, 2007). The term has, however, gained common currency as a shorthand description of the non-compensation options under Measure 37.

243. Measure 37, *supra* note 1, at § 1.

244. *Id.* §§ 8, 10. Section 8 provides:

[I]n lieu of payment of just compensation under this section, the governing body responsible for *enacting* the land use regulation may modify, remove, or not to [sic] apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property (emphasis added).

Id. § 8.

Section 10 provides: “Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation . . .” *Id.* § 10.

legislation or regulation, while section 10 provides that land use regulations can be waived by a list of specific government entities, some of which may simply *enforce* land use regulations enacted by other government entities, such as state agencies.²⁴⁵

The interaction between sections 8 and 10 is hardly clear. Do all government bodies responding to Measure 37 claims have the option to pay compensation or waive the regulation, as section 10 suggests? Or are there some government bodies (like those that enforce but did not enact the land use regulation in question) whose only option is to compensate claimants? Although some commentators have pointed to this potential ambiguity, neither the state nor the courts have addressed the issue.²⁴⁶ Some local governments that have adopted ordinances creating procedures for processing Measure 37 claims have also tried to address potentially overlapping state and county enforcement or enactment of land use regulations, but the early results were haphazard.²⁴⁷

Perhaps the most pressing uncertainty surrounding Measure 37 waiver provisions is whether these waivers are transferable; that is,

245. *Id.*

246. *See* Cook, *supra* note 36, at 263-64 (arguing that because it may allow enforcers of land use measures (local governments), rather than those government bodies which enacted them (state agencies), to waive land use regulations, Measure 37 disrupts the statewide planning system and "local governments are forced to illegally waive state laws"); Sommers, *supra* note 162, at 232-33 (describing murkiness of the measure's waiver provisions).

The state has not directly addressed the tension between sections 8 and 10. Instead, the state Attorney General's office has analyzed the two sections to determine whether waivers are transferable without expressing any apparent concern about the tension between the sections. *See* Letter Regarding Ballot Measure 37 from Stephanie Striffler, Special Counsel to the Attorney Gen., to Lane Shetterly, Or. Dep't of Land Conservation and Dev. (Feb. 24, 2005), available at <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf> [hereinafter AG Letter] (discussing whether waivers granted pursuant to sections 8 and 10 are transferable and whether those sections permit "blanket" waivers).

247. *See, e.g.*, Yamhill County Oregon, Ordinance 749, § 6(1)(c) (Dec. 1, 2004) (providing that, where the county has decided to waive a challenged county land use regulation, but the use remains prohibited by a state land use regulation, the county will notify DLCD of its waiver decision and may not permit the waived use until DLCD notifies the Yamhill County Board of Commissioners that it concurs with the county's decision or fails to respond within 180 days); MULTNOMAH COUNTY, OR., CODE § 27.530(K) (2004) ("Waiver of a county land use regulation does not constitute a waiver of any corresponding state statutes.") and § 27.530(H)(g) ("The land use regulation in question is not an enactment of the county [and thus the Board can deny a claim]."); LINN COUNTY, CODE § 225.570(C) (2005) ("The County is not responsible for any law, rule, ordinance, resolution, goal or other enactment if the law, rule, ordinance, resolution, goal or other enactment was not enacted by the County."). *But see, e.g.*, LANE COUNTY, OR., CODE §§ 2.700-.770 (2004) (setting forth Measure 37 claim procedures without addressing potentially overlapping state and county land use regulations); COOS COUNTY, OR., CODE §§ 11.04.010-.080 (2005).

Section 7 of Measure 37 provides that, although a local government may enact administrative procedures for processing Measure 37 claims:

in no event shall these procedures act as a prerequisite to the filing of a compensation claim [in state 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.

Measure 37, *supra* note 1, at § 7. This provision casts some doubt on the legal effect of local governments' ordinances. *See* Susan Marmaduke, *The Effect of Administrative Decisions on Claims for Compensation in Circuit Court Under Measure 37*, 20 J. ENVTL. L. & LITIG. 329, 334-38 (2005) (discussing issues raised by Measure 37 § 7).

whether they are personal to the claimant or run with the land and can be used by future purchasers of a successful Measure 37 claimant's property. Since much of a waiver's economic value inheres in the ability of a landowner to transfer the rights conferred by the waiver to a purchaser of her property (for example, a developer), this question has attracted considerable attention.²⁴⁸ Aside from generating a lively debate among commentators and interest groups, however, only the Oregon State Attorney General and one circuit court have thus far addressed the issue.

1. The State Attorney General's Opinion

In February 2005, the state Attorney General's office addressed the transferability issue in an opinion letter to the Director of the DLCDC.²⁴⁹ The letter concluded that Measure 37 waivers are personal to the landowner to whom they are granted and cannot be transferred with the land.²⁵⁰ The Attorney General reached this conclusion by analyzing the text of the measure as well as the voters' intent, as gleaned from the arguments in favor of the measure appearing in the voters' pamphlet, newspapers, and television ads.²⁵¹

Sections 8 and 10 of the measure allow the government entity, in lieu of paying compensation, to (1) modify, (2) remove, or (3) not apply a land use regulation "to allow the owner to use the property for a use permitted at the time the owner acquired the property."²⁵² The Attorney General concluded that this language "only provides authority for a public entity to waive a law to the extent necessary to allow an otherwise prohibited use by the 'present' owner, i.e., the owner at the time the exemption is granted."²⁵³ Under this interpretation, Measure 37 authorizes

248. See, e.g., Jona Maukonen, *Transferring Measure 37 Waivers*, 36 ENVTL. L. 177, 184 (2006) (concluding that waivers are not transferable but suggesting that a landowner who obtains a Measure 37 waiver may gain a vested property right in the waiver, and thus be able to transfer it, if she meets Oregon's multi-factor test for determining vested property rights); Sommers, *supra* note 162, at 238-39 (discussing waiver transferability); Oregonians In Action, *Ballot Measure 37 Frequently Asked Questions*, Question No. 7, <http://measure37.com/measure%2037/faq.htm#6> (last visited Nov. 8, 2007) (arguing that waivers are transferable); 1000 FRIENDS OF OR., *MEASURE 37: SUMMARY AND QUESTIONS*, Question No. 6 (2005) (arguing that waivers are not transferable).

249. AG Letter, *supra* note 246. The letter was a response to two questions posed by the DLCDC director: (i) are Measure 37 waivers transferable?; and (ii) can a public entity grant "blanket" or categorical Measure 37 waivers, rather than granting them on a case-by-case basis? *Id.* at 1. The answer to the first question is discussed above. As to the second question, the Attorney General concluded that public entities may not waive land use laws on a "blanket" basis, but must respond to each Measure 37 claim individually, waiving land use regulations or paying compensation only if the claim meets the criteria under the measure. Local governments "may not decide in advance that all claims that involve a particular law, or that involve owners who acquired their property after a particular date, or some other subset of the potential universe of claimants, will be granted relief." *Id.* at 1, 7-8.

250. *Id.* at 7.

251. *Id.* at 2.

252. *Id.* at 3 (quoting Measure 37, *supra* note 1, at §§ 8, 10 (emphasis omitted)).

253. *Id.* at 4.

government entities to make exemptions that are only personal to the landowner to whom they were granted.²⁵⁴

The Attorney General reasoned that the plain meaning of the text was bolstered by its "immediate context"; namely, the types of non-monetary relief authorized by the measure.²⁵⁵ The first two means of providing non-monetary relief to claimants—"modifying" or "removing" the regulation—could be accomplished by actions that were either personal to the current landowner or by actions that run with the land, and thus shed no light on the voters' intent.²⁵⁶ But the third means of non-monetary relief—to "not apply" the regulation—did reflect the voters' intent, because, in the opinion of the Attorney General, it could be accomplished only by government actions that are personal to the owner.²⁵⁷ The provision authorized government bodies to discontinue enforcing an existing regulation against a particular landowner, but the regulation would otherwise remain in force.²⁵⁸ Thus, a decision by a government entity not to apply a law "would necessarily be personal to the owner submitting the claim," according to the Attorney General.²⁵⁹

The history of the measure supports the Attorney General's conclusion. In particular, the measure's chief petitioners submitted to the voters' pamphlet an argument in favor of Measure 37 that was consistent with the interpretation that waivers are not transferable.²⁶⁰ The argument stated that if an owner entitled to Measure 37 compensation conveys her property, the transfer establishes a new date of acquisition for purposes of determining what laws give rise to a claim.²⁶¹ The Attorney General

254. *Id.*

255. *Id.*

256. *Id.* According to the Attorney General, a land use regulation could be modified or removed in two ways. The normal way for a government body to modify a law would be to amend it; the normal way for it to remove a law would be to repeal it. A government body could "modify the law to provide that 'this law shall not affect the real property at 111 Maple Drive, Anytown, Oregon,'" thus making a modification that runs with the land. It could equally as well modify a law "to provide that 'this law shall not affect any real property at 111 Maple Drive, Anytown, Oregon that is owned by John Doe,'" thus making a modification that is personal to the owner. *Id.* (emphasis omitted). "The fact that either [option] is technically possible means that this context does not shed any light one way or the other on whether the voters intended non-monetary relief to be personal to the present owner or to run with the land." *Id.*

257. *Id.* at 4-5.

258. *Id.* at 5 (noting that, except for the particular Measure 37 claimant, the regulation would otherwise continue unaltered, and if the present owner conveys the property to a new owner the public entity would have no lawful basis for not enforcing it if the conditions that create the right to relief under Measure 37 ceased to exist (e.g. if the property were acquired by someone who was not entitled to an exemption in his own right)).

259. *Id.*

260. *See id.* at 6.

261. *See id.* at n.5. The Voters' Pamphlet argument in support of the measure to which the Attorney General referred was submitted by Dorothy English, Barbara Prete and Eugene Prete. The argument is somewhat less clear than the Attorney General made it out to be, and was actually intended to clarify the measure's definition of "owner" in order "to instruct and aid the Oregon courts in determining the legislative intent behind Ballot Measure 37." Voters' Pamphlet, *supra* note 146, at 113. The argument explained that, when an original owner transfers less than the entire interest in her property to another, she is still the "owner" for purposes of Measure 37, and her

thought that this was “a clear statement that the chief petitioners expected that the relief available under the measure depends on when the current owner acquired the property—that the relief is personal to the current owner.”²⁶² It followed that if the current owner is eligible for relief, then sells the property, the new owner is eligible for relief only from laws adopted after she acquired the property.²⁶³

Based on this analysis of the text, context, and history of the measure, the Attorney General concluded that Measure 37 authorizes governmental bodies to waive land use laws only to allow the present owner to use the property in a manner permitted at the time the present owner acquired the property.²⁶⁴ This waiver was not only the minimum that a government body was required to do to avoid compensating a landowner with a valid claim, but since there was no authority independent of Measure 37 authorizing government bodies to waive land use regulations, it was also the maximum it could do.²⁶⁵

2. The Crook County Circuit Court Decision

In August 2006, an Oregon trial court, the Crook County Circuit Court, addressed the transferability of Measure 37 waivers in the context of a special proceeding brought by Crook County under a statutory provision allowing a local government entity, such as a county governing body, to initiate a proceeding in circuit court to determine the legality of an enacted ordinance.²⁶⁶ Crook County passed Ordinance 153, which provided in relevant part that a Measure 37 waiver “properly recorded in the deed records of the county survives the sale or transfer of a property to new ownership.”²⁶⁷ In its suit, the county asked the circuit court to

acquisition date is the relevant date for purposes of determining what laws give rise to a Measure 37 claim. The relevant language provides:

If the current owner sells an interest in her property, so long as the current owner still has a current possessory interest, or a reversionary interest in the property, the provisions of Ballot Measure 37 apply using the date the current owner acquired the property. Only if the current owner sells all of her interest in a piece of property does the date of acquisition change for purposes of determining what regulations are subject to Ballot Measure 37 protections.

Id.

262. AG letter, *supra* note 246, at 6.

263. *Id.*

264. *Id.* at 7.

265. *Id.* The Attorney General noted that where a local government has discretion in implementing a land use ordinance (that is, the ordinance is not required by state law or regulation), the local government might have the authority to waive the ordinance with respect to both present and future landowners. Where a local government adopts an ordinance to implement a requirement of state or federal law, however, Measure 37 only authorizes the government to waive the law with respect to the present owner of the property. *Id.*

266. Crook County v. All Electors, No. 05CV0015 (Crook County Cir. Ct.), at ¶ 2, available at http://www.doj.state.or.us/hot_topics/pdf/measure37/crook_co_decision.pdf [hereinafter Crook County (No. 05CV0015)]. The special proceeding statute is codified at OR. REV. STAT. ANN. §§ 33.710-.720 (West 2007).

267. CROOK COUNTY, OR., ORDINANCE 153, § 12 (2004), available at <http://co.crook.or.us/LinkClick.aspx?fileticket=FLtnKMfQUmc%3D&tabid=78&mid=552> (last visited Nov. 8, 2007).

determine the legality of the ordinance's transfer provision. The state intervened in the case, as did a landowner who had been granted a waiver under Measure 37 and who wanted to sell the land—along with the waiver—to a developer.²⁶⁸ Both the successful Measure 37 claimant and Crook County argued that under the language of Ordinance 153, the landowner should be able to transfer his waiver to subsequent owners, while the state argued that Measure 37 allowed no such transferability and, to the extent the ordinance conflicted with the measure, it was preempted.²⁶⁹

The circuit court, per Judge George W. Neilson, sided with the state, concluding that the waiver transferability provision of Crook County's Ordinance 153 "can not operate concurrently with [Measure 37] and the related context of Oregon's planning and land use regulation structure."²⁷⁰ Consequently, Measure 37 preempted the ordinance's waiver transfer provision.²⁷¹ In reaching this conclusion, Judge Neilson noted that the ordinance and Measure 37 seemed to facially conflict, so he set out to "discern the intent of the voters to clarify the relationship of the enactments."²⁷²

Analyzing Ordinance 153, Judge Neilson determined that it was "clear from the text and context of Ordinance 153 that the Crook County Court²⁷³ intended to allow the land use regulation waivers granted in lieu of compensation to survive the sale or transfer of the subject property to any new owner if the sale or transfer is made after the 'waiver' is recorded."²⁷⁴ Since the text of Measure 37 neither expressly prohibits nor permits the transfer of land use waivers,²⁷⁵ Judge Neilson turned to the

268. See generally Crook County (No. 05CV0015), *supra* note 266. OR. REV. STAT. § 33.720(2) provides that the entity initiating a proceeding under OR. REV. STAT. § 33.710 must publish notice of the proceeding. OR. REV. STAT. § 33.720(2) (2005). Any person interested in the matter may appear before the court and "contest the validity of the proceeding, or any of the acts or things therein enumerated." OR. REV. STAT. § 33.720(3). In addition, OR. REV. STAT. § 33.710(4) provides that the court cannot conduct a judicial examination or render a judgment under the statute absent a justiciable controversy. OR. REV. STAT. § 33.710(4) (2005).

A second landowner, whose Measure 37 claim had been denied by the county, also intervened. This landowner challenged the claims procedures established by Ordinance 153. The court deemed his claim not to be justiciable, however, because the county had adjudicated the landowner's claim despite his failure to fully comply with the claims process. Crook County (No. 05CV0015), *supra* note 266, at 5.

269. Crook County (No. 05CV0015), *supra* note 266, at 6.

270. *Id.* at 12 (referring to the statutory codification of Measure 37, OR. REV. STAT. § 197.352 (2006)).

271. *Id.*

272. *Id.* at 6.

273. The Crook County Court is the governing body of Crook County. *Id.* at 8.

274. *Id.*

275. *Id.* Judge Neilson drew support for this conclusion by noting that the measure "acknowledges land use regulations may continue to change and develop because the text distinguishes between land use regulations adopted prior to December 2, 2004 [the date Measure 37 became effective] and regulations adopted thereafter." *Id.* He also observed that the measure limits governing bodies' authority to grant waivers to the present owner, limits the extent of the waiver to those uses permitted when the owner acquired the property, and expressly bars claims based upon land use

measure's context. He emphasized that the measure, by its own terms, became a part of Oregon's comprehensive land use planning statute.²⁷⁶ The primary benefit of Measure 37 waivers, according to Judge Neilson, is the landowner's opportunity to exercise land uses, even though those uses would have been prohibited under existing land use regulations.²⁷⁷ But "while the waived owner's right to use the property is protected under [Measure 37], no statutory exception exists which would allow the owner to transfer all interest in the property and preserve for the new owner the right to use the property under the waiver."²⁷⁸

Judge Neilson proceeded to state, however, that Measure 37 did not repeal the historic doctrine that owners acquire a vested, and transferable, right to a permitted use if they make a substantial investment or engage in substantial effort in exercising that use.²⁷⁹ He concluded that Measure 37 and "the historic doctrine of vested rights complement one another"; thus, "[t]he waived owner that exercises a permitted use and makes a substantial effort or substantial investment in the use may continue and convey the use to a new owner even though the land use regulations change."²⁸⁰ But absent such a vesting, waivers were not transferable under Measure 37, which preempted the contradictory local ordinance.

By interpreting Measure 37 in the context of, rather than as a reaction to, Oregon's comprehensive land use system, the Crook County Circuit Court may signal a way in which other courts may interpret the measure's scope. Both the circuit court's decision and the Attorney General's opinion suggest that the reach of Measure 37 may be interpreted narrowly, relying on expressions of voter intent to integrate the measure into Oregon's land use planning system. Such a narrow, contextual interpretation of the measure is supported by well-established principles of statutory construction for citizen initiatives.²⁸¹ Courts are

regulations enacted prior to the date the owner acquired the property, concluding that "voters intended the date of acquisition to be a significant date." *Id.* at 9.

Judge Neilson also found support for the notion that Measure 37 should be interpreted as part of the state's comprehensive land planning program in statements in the voter's pamphlet, citing an argument submitted by Dorothy English, Barbara Prete, and Eugene Prete that discussed the significant effects of a change in ownership on Measure 37 rights. He also found significant the two exceptions to the Measure 37's general rule that new owners of property acquire subject to land use restrictions in force on the date of acquisition: 1) if the seller "retains a possessory or reversionary interest in the property"; or 2) if the new owner "acquires the property from a family member." *Id.* at 10. In both cases, the date of ownership relates back to the prior owners. Judge Neilson thought these exceptions reinforced the importance of the date of acquisition of the property. *Id.*

276. *Id.* at 8.

277. *Id.* at 9.

278. *Id.* at 11.

279. *Id.*

280. *Id.* at 12.

281. See *Strahan v. Fred Meyer, Inc.*, 11 P.3d 228, 241 (Or. 2000) (interpreting a statutory provision adopted through the initiative process by applying the same methodology that applies to the construction of a legislatively enacted statute). The court seeks to determine the intent of the voters who pass the measure. The best evidence of the voters' intent, and the first level of analysis, is the text of the provision itself. *Roseburg Sch. Dist. v. City of Roseburg*, 851 P.2d 595, 597 (Or.

on solid ground if they interpret Measure 37's ambiguities in a manner that least conflicts with provisions in Oregon's well-established land use system.

IV. EXCEPTIONS TO MEASURE 37'S COMPENSATION REQUIREMENT

Measure 37 expressly exempts five categories of land use restrictions from its compensation requirement: regulations that (1) restrict activities commonly and historically recognized as public nuisances under common law;²⁸² (2) restrict activities for the protection of public health and safety;²⁸³ (3) are required to comply with federal law;²⁸⁴ (4) restrict the use of property for the purpose of selling pornography or performing nude dancing;²⁸⁵ or (5) are passed before the present owner or one of her family members, as the term is defined in the measure, acquired the property.²⁸⁶ Except for the exception for land use regulations required to comply with federal law,²⁸⁷ courts have yet to address these exceptions. The exceptions are potentially far-reaching, however, and could be interpreted to significantly limit the measure's scope. This section examines the meaning, scope, and implications of each.

A. The Public Nuisance Exception

Section 3(A) of Measure 37 exempts from compensation those land use regulations "[r]estricting or prohibiting activities commonly and historically recognized as public nuisances under common law."²⁸⁸ This provision instructs that "[t]his subsection shall be construed narrowly in favor of a finding of compensation under this section."²⁸⁹ No court has interpreted this exception, nor has the state Attorney General issued any guidance on the state's interpretation.²⁹⁰

1993). The meaning of an initiative's terms is a function of the context in which the measure's drafters used those words. *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 859 P.2d 1143, 1145-46 (Or. 1993). If the meaning is not clear from the text, the next level of inquiry looks to the history of the provision, focusing on information available to the voters at the time the measure was adopted to determine what the voters understood the measure to mean, including the ballot title, explanatory statement and arguments for or against the measure, and contemporaneous news reports on the measure. *Ecumenical Ministries v. Or. State Lottery Comm.*, 871 P.2d 106, 111 n.8 (Or. 1994); *Strahan*, 11 P.3d at 243.

282. Measure 37, *supra* note 1.

283. *Id.* § 3(B).

284. *Id.* § 3(C).

285. *Id.* § 3(D).

286. *Id.* § 3(E).

287. *Columbia River Gorge Comm'n v. Hood River County*, 153 P.3d 997, 998 (Or. Ct. App. 2007); *see infra* notes 355-64 and accompanying text.

288. Measure 37, *supra* note 1, at § 3(A).

289. *Id.*

290. The state Attorney General did issue an extensive opinion memorandum in 2001 interpreting the provisions of Measure 7. *See Or. Op. Att'y. Gen. supra* note 113. Like Measure 37, Measure 7 contained a negligence exception to its compensation requirement. Measure 7's exception was more broadly worded than that of Measure 37, as it excepted from compensation the "adoption or enforcement of historically and commonly recognized nuisance laws." *See Measure 7, supra* note 2. The Attorney General interpreted Measure 7's exception broadly to include "statutes, rules

In construing Measure 37 and its exceptions, Oregon courts will apply well-established rules of initiative construction to determine the voters' intent at the time the voters adopted the measure.²⁹¹ Courts look first to the text of the measure within its context, including its relation to other provisions of the same and related statutes, prior enactments and prior interpretations of those and related statutes, and the historical context of those enactments.²⁹² If the voters' intent is not clear from the text and context of a measure, courts next examine the ballot title, its explanatory statement, voters' pamphlet arguments, contemporaneous news reports, and other information available to voters at the time of the measure's adoption.²⁹³ If these materials still do not reveal clear voter intent, courts interpret ambiguities by applying canons of interpretation, including the maxim that the language of a statute should be construed in a manner consistent with its assumed purposes.²⁹⁴

The text of the public nuisance exception, which excuses a government from compensating landowners for any devaluation to their land caused by laws that prohibit "activities commonly and historically recognized as public nuisances under common law," is quite ambiguous.²⁹⁵ One ambiguity is that, while Measure 37 requires compensation for "land use regulation . . . that restricts the use of private real property or any interest therein,"²⁹⁶ the right to commit a public nuisance does not inhere in the use of property.²⁹⁷ Land use restrictions prohibiting common law public nuisances would not seem to implicate any interest protected by Measure 37, and thus the measure would not have to except them. It is not clear, then, what this exception adds.

and local ordinances that restrict or prohibit uses of private real property that have historically and commonly been recognized as a nuisance by the judicial, legislative or quasi-legislative branches of government. This almost certainly includes state and local civil and criminal nuisance abatement laws." Or. Op. Att'y. Gen. *supra* note 113, at *13. This perhaps also includes "other longstanding restrictions and prohibitions or uses that operate to prevent or remedy harm or injury to public rights, health, safety or morals." *Id.* at *14. The narrower wording of Measure 37's exemption is likely a direct reaction to the Attorney General's broad interpretation of Measure 7's language.

291. *Strahan v. Fred Meyer, Inc.*, 11 P.3d 228, 241 (Or. 2000); *Ecumenical Ministries v. Or. State Lottery Comm.*, 871 P.2d 106, 111 (Or. 1994); *Portland Gen. Elec. Co. v. Bureau of Labor and Indust.*, 859 P.2d 1143, 1145-46 (Or. 1993). Courts interpret initiatives in the same manner as they interpret statutes, except that, where it matters, voter intent substitutes for legislative intent. *Id.*; see also *Crook County (No. 05CV0015)*, *supra* note 266, at 6-7 (describing canons of interpretation for voter initiatives).

292. *Young v. State*, 983 P.2d 1044, 1046 (Or. 1999); *Roseburg Sch. Dist. v. City of Roseburg*, 851 P.2d 595, 597 (Or. 1993); *Portland Gen. Elec. Co.*, 859 P.2d at 1146.

293. *Ecumenical Ministries*, 871 P.2d at 110-11.

294. *Portland Gen. Elec. Co.*, 859 P.2d at 1146-47.

295. Measure 37, *supra* note 1, at § 3(A).

296. *Id.* § 1.

297. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.20 (1987) (stating that "no individual has a right to use his property so as to create a nuisance or otherwise harm others"); *Smoikal v. Empire Lite-Rock, Inc.*, 547 P.2d 1363, 1365, 1368 (Or. 1976) (stating that "one cannot acquire a prescriptive right to maintain a public nuisance no matter how long it has continued," and finding that a rock-processing plant was liable to neighbors under a public nuisance theory for damage to their property caused by emissions emanating from the plant).

What is meant by the exception's reference to a public nuisance "under common law" is another ambiguity. Does the exception extend to public nuisance prohibitions created by statute, such as laws prohibiting the siting of a nuclear facility on a fault line,²⁹⁸ or only to land use restrictions codifying historical common law public nuisances?²⁹⁹ If the latter, government would potentially have to compensate landowners for any law seeking to abate a nuisance not previously recognized as a common law public nuisance, effectively freezing the law.³⁰⁰

What is meant by the phrase "commonly and historically recognized" is another ambiguity.³⁰¹ The Oregon Supreme Court has defined common law public nuisance as "an unreasonable interference with a right which is common to members of the public generally."³⁰² The court historically recognized a number of activities in which private property owners had no right to engage because they constituted public nuisances.³⁰³ In 1905, the Oregon Supreme Court articulated the catego-

298. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (illustrating the evolution of common law nuisance with the example that no Fifth Amendment compensation would be due to "the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault").

299. Defining statutes that codify common law public nuisance can be difficult. One commentator noted, "the common law of nuisance has long given 'a fairly helpful clew' on the validity of statutory land-use restrictions that augment existing common law. The common law of nuisance has historically been consulted, however, 'not for the purpose of controlling' the question of validity, but only 'for the helpful aid of its analogies.'" John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 7 (1993) (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)).

300. Such a restriction of public nuisance law would have far-reaching effects, and would certainly be a radical departure from the manner in which current takings jurisprudence treats laws that impinge on property to abate nuisances. See, e.g., *Lucas*, 505 U.S. at 1035 (Kennedy, J. concurring) (stating "the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society"); Blumm & Ritchie, *supra* note 25, at 333-36 (discussing the development of categorical nuisance defense to takings claims after the U.S. Supreme Court's *Lucas v. S. C. Coastal Council* decision, noting the court's acknowledgment "that background principles nuisances have the potential to evolve beyond their present scope," stating that "because nuisance law is continually expanding, new knowledge concerning the value of particular resources may . . . [impose] liability for acts which have not historically been considered to be common law nuisances," and citing a number of courts that have held background principles nuisances to include non-common law nuisances); Humbach, *supra* note 299, at 7 (noting the "vital legislative function of modifying and supplementing the common law when the latter proves inadequate to meet changing needs"); see also DOUGLAS KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 117, 127 (2000) (describing flexibility of the nuisance defense to takings claims).

301. Measure 37, *supra* note 1, at § 3(A).

302. See, e.g., *Raymond v. S. Pac. Co.*, 488 P.2d 460, 462-63 (Or. 1971) (citing RESTATEMENT (SECOND) OF TORTS: SCOPE AND INTRODUCTORY NOTE TO CH. 40, at 216-18 (1977)).

303. Oregon courts have identified a number of activities to constitute public nuisances. See generally *Mark v. State Dep't of Fish and Wildlife*, 974 P.2d 716 (Or. 1999) (public nudity); *Fraday v. Portland Gen. Elec.*, 637 P.2d 1345 (Or. 1981) (sound waves resulting from power generating activities); *Smejkal v. Empire Lite-Rock, Inc.*, 547 P.2d 1363 (Or. 1976) (air pollution from rock-processing plant); *Spencer Creek Pollution Control Assoc. v. Organic Fertilizer Co.*, 505 P.2d 919 (Or. 1973) (odors from feedlot); *Bither v. Baker Rock Crushing Co.*, 438 P.2d 988 (Or. 1968) (air pollution from rock quarrying and crushing operations); *State ex rel. State Sanitary Auth. v. Pac. Meat Co.*, 360 P.2d 634 (Or. 1961) (operation of meat packaging company); *Wilson v. Parent*, 365 P.2d 72 (Or. 1961) (shouting obscenities in the street); *Keller v. Gibson Packaging Co.*, 257 P.2d 621 (Or. 1953) (operation of a rendering plant); *Columbia River Fishermen's Protective Union v.*

ries of public nuisance at common law to include acts that “outraged public decency and were against good morals,” “injuriously affected the public health,” or “disturbed or injured the public peace or morals.”³⁰⁴

A number of Oregon statutes have also codified—and criminalized—certain common law public nuisances.³⁰⁵ One such statute criminalized “any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals,”³⁰⁶ language the Oregon Supreme Court has characterized as “essentially descriptive” of common law public nuisance.³⁰⁷ Instead of attempting to distinguish between statutorily defined public nuisances and common law public nuisances, Oregon courts have looked to the latter to define the former.³⁰⁸ The courts have also uniformly recognized the context-dependent nature of public nuisance, whether codified or not.³⁰⁹ Just what Measure 37’s

City of St. Helens, 87 P.2d 195 (Or. 1939) (pollution of river which killed fish); *Wilson v. City of Portland*, 58 P.2d 257 (Or. 1936) (city dumping municipal garbage in a ravine).

304. *State v. Nease*, 80 P. 897, 898 (Or. 1905). The court stated in full:

Certain acts were punishable as nuisances at common law because they outraged public decency and were against good morals, such as habitual, open, and notorious lewdness, roaming the streets naked, the indecent exposure of the person on a highway or in a public place, the exhibition of an unseemly or obscene sign or picture, and other similar matters. Other acts were likewise punishable because they injuriously affected the public health, such as maintaining slaughterhouses in a populous neighborhood, or the exposing for sale for human food of putrid or infected articles which were injurious to the health . . . and the like. Still others because they disturbed or injured the public peace or morals, by congregating large numbers of idle and dissolute persons in one place for vicious purposes

Id.

305. *See, e.g.*, ORE. COMPILED LAWS ANN. § 23-919 (codified, as amended, at OR. REV. STAT. § 167.105 (2005), *repealed by* 1971 Or. Laws 743, § 432) (keeping a bawdyhouse); ORE. COMPILED LAWS ANN. § 23-929 (codified, as amended, at OR. REV. STAT. § 167.110 (2005), *repealed by* 1971 Or. Laws 743, § 432) (keeping a gaming house); OR. STAT. § 24-142 (codified, as amended, at OR. REV. STAT. § 471.620 (2005)) (sale of alcohol without a license).

306. OR. REV. STAT. § 161.310 (2005), *repealed by* 1971 Or. Laws 743, § 432 (*repealing* OR. STAT. § 14-722 (1953)).

307. *Nease*, 80 P. at 898; *see also State v. Franzone*, 415 P.2d 16, 19 (Or. 1966) (“the nuisance statute, as this court has frequently said, was intended to cover offenses against the public peace, the public health, and the public morals not elsewhere made punishable by the criminal statutes and which were known at common law as indictable nuisances”). Courts have cited the statute in enjoining behavior ranging from operating a gambling house to engaging in lewd acts. *See Nease*, 80 P. at 897 (gambling house); *Franzone*, 415 P.2d at 16 (lewd behavior).

308. *See, e.g., Wilson v. Parent*, 365 P.2d 72, 78-79 (Or. 1961) (upholding equitable relief enjoining defendant from obscene conduct relying on both common law nuisance and anti-obscenity statute and noting with approval that the lower court “looked to common law for a definition of the general words of the statute”). *But see Bowden v. Davison*, 289 P.2d 1100, 1111 (Or. 1955) (declaring horse-round-up statute invalid as applied to privately owned horses and stating that “[a] legislative declaration that a certain thing [here unbranded horses at large on public land] constitutes a public nuisance is not final. It has no power to declare that to be a public nuisance which in fact is not. What constitutes a public nuisance is a judicial question.”).

309. *See, e.g., E. St. Johns Shingle Co. v. Portland*, 246 P.2d 554, 561-62 (Or. 1952) (stating “[t]he law of nuisance affords no rigid rule to be applied in all instances”) (citing *Stevens v. Rockport Granite Co.*, 216 Mass. 486 (Mass. 1914)); *Raymond v. S. Pac. Co.*, 488 P.2d 460, 462 (Or. 1971) (stating “there is general agreement that [the law of nuisance] is incapable of any exact or comprehensive definition”) (citation omitted); *see also Dep’t of Env’tl. Quality v. Chem. Waste Storage and Disposition, Inc.*, 528 P.2d 1076, 1081 (Or. App. 1974) (determining that, under the

reference to “common law nuisance” was meant to encompass, and whether and how it includes statutorily defined nuisances, is hardly clear from the text of the exception.

The context of the exception is similarly unhelpful in clarifying the voters’ intent. By its terms, Measure 37 was meant to be, and has been, “added to and made a part of ORS chapter 197,” Oregon’s land use planning statute.³¹⁰ So Measure 37, as part of the land use planning statute, must be interpreted in the context of, and as consistently as possible with, that system.³¹¹ This context arguably suggests that, to the extent land use laws aim to abate public nuisances, they must qualify for the section 3(A) exemption from compensation.

The history of the exception, however, casts some doubt on the contextual inference that land use laws abating public nuisances qualify for section 3(A)’s exemption. The most relevant evidence of voters’ intent is an argument in support submitted by Measure 37’s chief petitioners appearing in the voters’ pamphlet, which stated:

Opponents of Ballot Measure 37 are trying to scare voters into thinking the measure will prevent the state government and local governments from enacting nuisance abatement laws. This is incorrect. Nuisance abatement laws are exempted from Ballot Measure 37 protections, but again, a law that is currently considered a regulation of land use law under Oregon law cannot be re-characterized as a nuisance abatement ordinance in order to avoid Ballot Measure 37.³¹²

This statement appears to contradict itself. On the one hand, excepting “nuisance abatement laws” from Measure 37’s compensation requirement seems to encompass a broader spectrum of laws than just public nuisances at common law. On the other hand, the admonition that laws now categorized as land use laws are not exempt from the measure’s compensation requirement seems to limit the scope of the exception—as well as take it out of its context as a land use law itself.³¹³

facts at issue, the operation of a chemical pesticides waste site in violation of hazardous waste statutes did not constitute a public nuisance). For a discussion of the difficulties of defining common law nuisances in the context of takings claims, see Humbach, *supra* note 299, at 10-18 (stating “common law nuisance has never confined courts to a reiteration of past cases declaring certain past uses to be nuisances,” “public nuisance is, if anything, even more indeterminate than private nuisance in the range of behavior to which it can potentially apply,” and “[nuisance law] is not a flat set of prohibitions against various deleterious activities or blameworthy conduct. It is, instead, a multifaceted balancing process for deciding which harms to prohibit.”).

310. Measure 37, *supra* note 1, at pmb1.

311. See Crook County (No. 05CV0015), *supra* note 266, at 8 (noting that Measure 37, by its own terms, became part of the comprehensive land use planning statute and should be interpreted in the context of comprehensive land use planning).

312. Ballot Measure 37, Chief Petitioners’ Statements, http://www.measure37.com/measure%2037/chief_petitioners_statements.htm (last visited Nov. 8, 2007).

313. Another of the chief petitioners’ arguments in favor emphasized the fact that land use laws were not exempt from the measure’s compensation requirement, stating “there currently exists a body of law in Oregon which defines what constitutes regulation of land use. It is those regulations

The ambiguity of the text and context of the measure's nuisance exception arguably broaden its potential reach. Given the courts' use of common law public nuisance to interpret nuisance statutes,³¹⁴ the contextual nature of public nuisance, and the placement of Measure 37 within the comprehensive land use planning statute, the language of this exception may afford courts considerable latitude in determining which laws qualify for the exception.³¹⁵

Although not directly relevant to interpreting the provision's ambiguity,³¹⁶ the historical context of Measure 37's nuisance exception sheds some light on the extreme libertarian philosophy underlying the measure. Measure 37's precursor, Measure 7, also contained an exception for public nuisance laws, which excepted from its compensation requirement the "adoption or enforcement of historically and commonly recognized nuisance laws."³¹⁷ Measure 7's language was broader than Measure 37's, including the word "adoption" and a reference to plural "laws."³¹⁸ In a 2001 opinion interpreting Measure 7, state Attorney General Hardy Myers emphasized the exception's broad language and interpreted it to include restrictions of activities "that have historically and commonly been recognized as a nuisance by the judicial, legislative or quasi-legislative branches of government."³¹⁹ According to the Attorney General, the Measure 7 exception was not limited to common law public nuisances,³²⁰ but rather was broad enough to include statutorily defined

that are subject to the provisions of Ballot Measure 37. The state government and/or local government should not be allowed to rename a land use regulation simply to avoid the protections of Ballot Measure 37." *Id.*

314. Humbach, *supra* note 299, at 7 (noting courts' use of common law of nuisance in interpreting validity of nuisance statutes); Bowden v. Davison, 289 P.2d 1100, 1111 (Or. 1955) (using common law nuisance to determine the validity of nuisance provisions of a horse-round-up statute).

315. Modern statutes embodying common law public nuisance principles might well qualify for the measure's exception. For instance, since pollution has long been considered a common law public nuisance, state pollution control statutes might fall within the measure's public nuisance exception. *See, e.g.*, 1 STATE ENVTL. L. § 3:1 (2006) (noting that most states consider pollution a classic public nuisance).

316. *See supra* notes 281, 291-94 and accompanying text, discussing court's focus on voter—not drafter—intent in interpreting ambiguous terms in ballot initiatives.

317. Measure 7, *supra* note 2, at § (b).

318. *Id.* Measure 7 provided:

For purposes of this section, adoption or enforcement of historically and commonly recognized nuisance laws shall not be deemed to have caused a reduction in the value of a property. The phrase 'historically and commonly recognized nuisance laws' shall be narrowly construed in favor of a finding that just compensation is required under this section.

Id.

319. Or. Op. Att'y. Gen., *supra* note 113 at *13.

320. The opinion is somewhat contradictory in its treatment of laws that codify common law public nuisance. In the opinion's summary, the Attorney General concluded that

[t]he prohibition of certain uses of property as a common law nuisance is not within this exception because there is no property right to maintain a nuisance and therefore the prohibition does not constitute a regulation restricting a use that is part of the owner's property right to begin with.

Id. at *14. However, later in the opinion, the Attorney General stated:

public nuisances³²¹ as well as “local enactments that function to prevent harm or injury to the rights of the public or to public health, safety or morals . . . if they govern a type of use of private property that has been historically and commonly recognized as a nuisance by judicial or legislative bodies in Oregon.”³²² The breadth of the Attorney General’s interpretation of Measure 7’s exception prompted some observers to suggest that Measure 7’s compensation requirement might be quite limited.³²³

Unlike Measure 7, Measure 37 limited its exception to “public nuisances under common law,” as distinguished from statutory public nuisances in the context of defining background principles restricting the use of property.³²⁴ Attempting to draw this distinction, the measure’s drafters appeared to have seized upon short-lived United States Supreme Court dicta that tried to distinguish between common law and statutory public nuisance.³²⁵ The Supreme Court never fully embraced this dis-

The text of Measure 7 also indicates that the voters intended to exempt more than common law nuisance. The voters excepted from the right to compensation, the “adoption or enforcement” of certain “nuisance laws.” The voters’ use of the plural “nuisance laws” is revealing. If the voters had intended to exempt only the abatement of common law nuisance, they would have used the singular “law.” Similarly, the fact that the voters also exempted the “adoption” of laws demonstrates that this set of laws includes more than the enforcement of existing rights to abate a common law nuisance, but rather includes laws that are enacted after the effective date of the Measure. As a result, we believe that the exception for “nuisance laws” in subsection (b) of Measure 7 applies to a set of “laws” that goes beyond common law public nuisance law.

Id. at *185-86. What is clear from the opinion is that the Attorney General thought that government had no obligation to compensate landowners under Measure 7 for restrictions based on either traditionally recognized statutory public nuisances or common law public nuisances. *Id.* at *202 (noting that the exception includes “at least the nuisance laws found today at [OR. REV. STAT. §] 105.550 to 105.600 and [OR. REV. STAT.] chapter 167, and their counterparts in local government ordinances”).

321. The opinion stated that Measure 7 excepted nuisance laws codified at chapter 167 and sections 105.550 through 105.600 of the Oregon Revised Statutes. *Id.* at *202-03. These statutory nuisances are quite broad, including actions newly identified as nuisances, such as improperly installing airbags in cars. Chapter 167 of the Oregon Revised Statutes concerns prostitution, obscenity, gambling, offenses involving controlled substances, offenses against animals, offenses involving tobacco, and various miscellaneous crimes such as creating a hazard, improper repair of vehicle airbags, and concealing the birth of an infant. OR. REV. STAT. §§ 167.022-167.055 (2005). Sections 105.550 through 105.600 declare use of property for prostitution, illegal drug activity, and unlawful gambling to be nuisances and authorize citizens as well as the Attorney General to bring abatement actions. OR. REV. STAT. § 105.550-105.600 (2005).

322. Or. Op. Att’y. Gen., *supra* note 113, at *202-03. “Historically and commonly recognized” meant that there was “a substantial history of regulation of the type of use throughout a significant part of the state.” *Id.* at *226-27.

323. See Dave Hogan, *Measure 7 Not Retroactive*, *Myers Says*, OREGONIAN, Feb. 14, 2001, at A01 (noting the reaction to Attorney General’s opinion and quoting one of the bill’s proponents stating that the interpretation limited the amount of compensation for which the government would be liable).

324. See Measure 37, *supra* note 1, at § 3(A). Measure 37’s exception excuses from compensation only restrictions “recognized as public nuisances under common law.” The provision omits Measure 7’s “adopted” and plural “laws,” perhaps suggesting that Measure 37’s drafters meant to exclude the statutorily created nuisances that the Attorney General included in his interpretation of Measure 7’s exception. See *supra* notes 320-21.

325. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (majority opinion stating that background principles “cannot be newly legislated or decreed.”).

inction, however,³²⁶ and it was subsequently abandoned by a Court majority.³²⁷ Nevertheless, Measure 37's drafters appear to have been influenced by the Court's short-lived effort to require compensation for "newly legislated or decreed" public nuisances, but not public nuisances recognized at common law.³²⁸ But limiting Measure 37's nuisance exception to common law nuisances would sever common law nuisance from statutory nuisance in a manner before now unrecognized by the courts, drastically curtailing the legislature's ability to enact new regulatory initiatives in response to changed conditions.

B. The Exception for Public Health and Safety Measures

Section 3(B) exempts from Measure 37's compensation requirement land use regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations."³²⁹ The exception pointedly omits "welfare," the inclusion of which would have largely eviscerated the measure's compensation requirement by taking most land use restrictions out of its purview.³³⁰ Nonetheless, the health and safety exception is potentially

326. Justice Kennedy disagreed with Justice Scalia's distinction between common law and statutory public nuisances, maintaining in his concurrence that background principles should not be limited to the common law of nuisance but must be flexible enough to take into account legislative responses to changing conditions. *Id.* at 1035 (Kennedy, J. concurring) ("[T]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and independent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their sources."). Moreover, Scalia's majority opinion also actually embraced the notion that background principles of nuisance have the potential to evolve beyond their present scope. *Id.* at 1031 (majority opinion) (noting that "changed circumstances may make what was previously permissible no longer so").

327. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (majority opinion) (noting "[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions"); *Tahoe-Sierra Presidential Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting) (citing *Palazzolo* and acknowledging that certain zoning and land-use laws may constitute background principles, because "zoning and permit regimes are a longstanding feature of state property law"); see also Blumm & Ritchie, *supra* note 25, at 355-58 (2005) (discussing the Supreme Court's taking jurisprudence, which has recognized that some statutes can constitute background principles, and concluding that there is "widespread agreement among the [Supreme] Court's members that at least some valid zoning and land use regulations are background principles").

328. *Lucas*, 505 U.S. at 1029. So, for example, where Measure 7 might exempt government from compensating landowners for a law disallowing the use of property for pigeon racing, Measure 37 arguably would not. See *supra* note 318-19 (discussing the types of laws the Attorney General considered to be included by Measure 7's exception).

329. Measure 37, *supra* note 1, at § 3(C).

330. Had the exception included land use restrictions in furtherance of the public welfare, the number of land use regulations for which government would have to compensate landowners would have greatly diminished, because the state's power to regulate for the general welfare has traditionally been interpreted very broadly. See generally *Berman v. Parker*, 348 U.S. 26, 33 (1954) (upholding against Fifth Amendment challenge government's condemnation of private property in furtherance of a plan to eliminating slums in Washington D.C., because aesthetic values were part of legislature's police power to preserve the general welfare and were thus legitimate ends for condemnation, stating "[t]he concept of public welfare is broad and inclusive . . . It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled"); *Or. City v. Hartke*, 400 P.2d 255 (Or. 1965)

quite sweeping. No court has yet interpreted the exception, but statements in the voters' pamphlet and by the Oregon governor's office and recent legislative proposals have addressed the scope of the exception.

The voters' pamphlet included an argument in favor by the measure's chief petitioners which sought to limit the scope of the exception.³³¹ The petitioners stated that "[i]t is not our intention that Ballot Measure 37 be interpreted in such a way as to allow statutes . . . and other means of regulation currently defined . . . as land use regulation to be bootstrapped into the definition of building codes, public health and safety codes, sanitation codes, or public welfare codes, by courts."³³² The petitioners maintained that "there currently exists a body of law in Oregon which defines what constitutes regulation of land use," and these were subject to the measure's compensation requirement.³³³ Government, the petitioners maintained, "should not be allowed to rename a land use regulation simply to avoid the protections of Ballot Measure 37."³³⁴ The petitioners' statement, though relevant to resolving ambiguities, does little to clarify the scope of the exception. The line between what constitutes a health and safety regulation and what constitutes a land use regulation is hardly as clear as the proponents suggested. For instance, Oregon's land use planning law is explicitly premised on the necessity of planning to ensure citizens' health and safety.³³⁵ The petitioners' inclusion of "welfare codes" in the list of laws that qualify for the exception further confuses matters.³³⁶

(finding it within city's police power to enact zoning laws excluding certain uses of property for aesthetic reasons, because general welfare encompasses these values); see also Meg Stevenson, *Aesthetic Regulations: A History*, 35 REAL EST. L.J. 519 (2007) (discussing the evolution of the incorporation of land use regulation for aesthetics into the conception of general welfare police power).

331. Chief Petitioners' Statements, *supra* note 312. The petitioners stated that they were providing their statement "in order to instruct and aid Oregon courts, so to avoid the courts [sic] from misinterpreting our intent behind this measure, as Oregon courts have a habit of doing." *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. OR. REV. STAT. § 197.005(1) (2007) (stating that "[u]ncoordinated use of lands within this state threatens the . . . health, safety . . . and welfare of the people of this state"); OR. REV. STAT. § 92.046(1) (2007) (providing that counties may adopt regulations requiring the approval of proposed partitions in order "to promote the public health, safety, and general welfare . . .").

336. See *supra* note 330 and accompanying text (discussing breadth of state's power to regulate for general welfare). Oregonians In Action nonetheless touts this Argument in Favor as limiting the scope of the exception in "Frequently Asked Questions" section of its website. See Oregonians In Action, Ballot Measure 37: Frequently Asked Questions, Question No. 6, available at <http://measure37.com/faq.htm#6> (last visited Nov. 8, 2007). Interestingly, Oregonians In Action also lists "traffic safety regulations" as an example of the health and safety regulations exempt from Measure 37's compensation requirement. *Id.*

According to the Oregon governor's office, the exemption covers laws "reasonably related to the achievement of" public health and safety.³³⁷ The state opined:

This exemption likely does not include laws for the protection of economic, social or aesthetic interests (or that aspect of the traditional "police power" that may be described as "general welfare"). However, a law that is reasonably related to public health or to public safety will come within the exception, even if it has some incidental economic, social or aesthetic benefit.³³⁸

The Oregon legislature also took up the health and safety exception. During the 2007 legislative session, it voted to refer a comprehensive revision of Measure 37, House Bill 3540, to the state's voters this upcoming November.³³⁹ The bill includes a definition of "protection of public health and safety" as

a law, rule, ordinance, order, policy, permit or other governmental authorization that restricts a use of property in order to reduce the risk or consequence of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster or threat to persons or property including, but not limited to, building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations.³⁴⁰

Even this revised language, however, leaves considerable ambiguity about what laws fall under the health and safety exception. For instance, state laws regulating the filling of wetlands, which require landowners to obtain permits from the Department of State Lands before removing material from riverbanks or streambeds, or filling in wetlands, might or might not qualify.³⁴¹ The statute's policy statement invokes health and safety, declaring that "unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state."³⁴² It also invokes recreation, the economy, fishing, and navigation,³⁴³ however, spotlighting the difficulty

337. Initial Questions & Answers, Governor Theodore R. Kulongoski, 2004 Oregon Ballot Measure 37, available at <http://www.oregon.gov/LCD/docs/measure37/m37qanda.pdf> ("The use of the word 'and' does not mean that the law must apply to both 'health and safety.' Instead, compensation under Measure 37 is not required as long as the law is reasonably related to one of those purposes.").

338. *Id.*

339. H.B. 3540, 74th Leg. Assem., Reg. Sess. (Or. 2007). House Bill 3540 is discussed in detail *infra* notes 464-94 and accompanying text.

340. H.B. 3540 § 2(18).

341. See OR. REV. STAT. § 196.810(1)(a) (2007).

342. OR. REV. STAT. § 196.805(1) (2007).

343. *Id.* The policy statement provides:

The protection, conservation and best use of the water resources of this state are matters of the utmost public concern. Streams, lakes, bays, estuaries and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for fish, avenues for transportation and sites for commerce and public recreation, are vital to the economy and well-being of this state and

of distinguishing between laws that protect health and safety and those that protect welfare more generally.³⁴⁴

C. *The Exception for Compliance with Federal Law*

Section 3(C) of Measure 37 excepts from its compensation requirement land use measures “to the extent the land use law is required to comply with federal law.”³⁴⁵ The exception contains a number of ambiguities. What “federal law” is exempted—statutes, regulations, or court decisions—is not clear. What state land use laws are “required” by federal law is also not obvious. This exception might or might not apply to state statutes and local ordinances implementing federal anti-discrimination laws,³⁴⁶ Endangered Species Act requirements,³⁴⁷ cooperative federalism statutes aiming to regulate activities consistent with a federally required standard,³⁴⁸ statutes making a state eligible for federal funds,³⁴⁹ and statutes implementing interstate agreements.³⁵⁰ Whether a

its people. Unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state. Unregulated filling in the waters of this state for any purpose, may result in interfering with or injuring public navigation, fishery and recreational uses of the waters. In order to provide for the best possible use of the water resources of this state, it is desirable to centralize authority in the Director of the Department of State Lands, and implement control of the removal of material from the beds and banks or filling of the waters of this state.

Id.

344. Other sections of the wetlands fill and removal law instruct the director of the Department of State Lands to issue permits if the proposed fill will not “unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation,” and mandate that the director take into account nine factors, only one of which deals with health and safety. OR. REV. STAT. § 196.825(2)-(3) (2005) (listing factors to be considered, including “whether the proposed fill conforms to sound policies of conservation and would not interfere with public health and safety”); other factors include economic impact, impact on recreation, public benefits resulting from the fill, and compatibility with comprehensive plans).

345. Measure 37, *supra* note 1, at § 3(C).

346. *See, e.g.*, OR. REV. STAT. § 447.210-447.280 (making certain buildings, including private entities such as clubs and churches, accessible to persons with disabilities, as did the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2006)).

347. *See, e.g.*, OR. REV. STAT. § 197.460 (2005) (requiring counties to ensure that destination resorts are compatible with the site and that habitat of threatened or endangered species is retained); OR. REV. STAT. § 527.710 (2005) (requiring certain forest practices to protect federally-listed species); OR. REV. STAT. § 517.956 (2005) (prohibiting the loss of threatened or endangered species’ critical habitat as a result of certain mining processes).

348. *See, e.g.*, OR. REV. STAT. § 468B (2005) (Oregon water quality statutes adopted in compliance with the federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006)); OR. REV. STAT. § 468A (2005) (Oregon clean air statutes adopted in compliance with the federal Clean Air Act, 42 U.S.C. §§ 7401-7671 (2006)); OR. REV. STAT. § 654 (2005) (Oregon Safe Employment Act adopted in compliance with the federal Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (2006)); OR. REV. STAT. §§ 459.046, 466.086 (2005) (state laws adopted in compliance with the federal Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* (2006)).

349. For example, 16 U.S.C. § 1455b(c)(3) (2006) directs the federal Secretary of Interior to withhold funding from states which fail to submit to it comprehensive coastal nonpoint pollution control programs under the federal Coastal Zone Management Act. The Oregon Department of Environmental Quality reports on its website that it has promulgated a number of regulations which, together, constitute a nonpoint pollution control program, and that it has submitted this plan to EPA and NOAA in 1995, received conditional approval in 1998 and has “completed all but a few” of the requested amendments. *See* Oregon Coastal Management Program, http://www.oregon.gov/LCD/OCMP/WatQual_Intro.shtml (last visited Nov. 8, 2007) (discussing

local government must compensate landowners for state statutes or local ordinances that are more restrictive than required by federal law is also unclear.³⁵¹ Neither the text nor the context of Measure 37 resolves these ambiguities.³⁵² But an Oregon Court of Appeals decision³⁵³ and the state Attorney General's 2001 interpretation of Measure 7's federal law exception provide some guidance.³⁵⁴

The Oregon Court of Appeals interpreted the federal law exception in the context of land use regulations passed by three Oregon counties located within the Columbia River Gorge National Scenic Area—an area including parts of three counties in Washington and three counties in Oregon³⁵⁵—designated in 1986 by Congress as a national scenic area in order to protect its scenic, cultural, recreational, and natural resources.³⁵⁶ In 2005, two landowners in Hood River County, one of the three Oregon counties in the scenic area, filed Measure 37 claims, seeking compensation for land use ordinances that restricted the subdivision and development of their property. The Columbia River Gorge Commission (“Gorge Commission”) then filed suit, claiming that Measure 37 excepted from its compensation requirement land use ordinances that implemented the scenic area act and the Commission's management plan, because they

Oregon's coastal nonpoint pollution control program); *see also* 23 U.S.C.A. § 158 (2007) (directing Secretary of Transportation to withhold a portion of federal highway funding from states with minimum drinking ages below 21 years old); OR. REV. STAT. § 471.430 (2005) (setting minimum drinking age at 21).

350. *See, e.g.*, OR. REV. STAT. § 196.150 (2005) (Columbia River Gorge Compact with Washington State).

351. For example, must a local government compensate a landowner where a county ordinance implementing Endangered Species Act is more protective of habitat than required by the federal act?

352. Neither the voters' pamphlet nor media accounts at the time the measure was adopted explained or discussed the federal law exception.

353. *Columbia River Gorge Comm'n v. Hood River County*, 152 P.3d 997, 998 (Or. Ct. App. 2007).

354. *See generally* Or. Op. Att'y., *supra* note 113.

355. The Washington counties are Clark, Klickitat and Skamania; the Oregon counties are Hood River, Multnomah and Wasco. *Columbia River Gorge Comm'n*, 152 P.3d at 1002.

356. 16 U.S.C.A. § 544(a) (2007). The act establishing the scenic area authorized Oregon and Washington to create, through an interstate agreement, an explicitly non-federal regional land planning agency, the Columbia River Gorge Commission. § 544c(a)(1)(A) (providing that the Commission “shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law”). In 1987, Oregon and Washington entered into the Columbia River Gorge Compact, which established the Commission. OR. REV. STAT. § 196.150 (2005); R.C.W. § 43.97.015 (2007). The Compact tasked the Commission with developing land use designations and adopting a land use management plan for the scenic area. § 544d(a)-(c). The scenic area act designated nine specific standards for the management plan and county ordinances implementing the plan to preserve farm, forest and open-space land and confine commercial and industrial development to urban areas. § 544d(d). The act specified that, once the Commission developed a management plan, the six counties within the area must each adopt land use ordinances “consistent with the management plan” or the Commission would regulate land use within the scenic area in that county. § 544e(b)(1). The act directed the Secretary of Agriculture to review and approve the Commission's management plan, with which the county zoning ordinances had to be consistent. § 544d(f) (approval of management plan); § 544f(j) (approval of ordinances). *See generally* Michael C. Blumm & Joshua D. Smith, *Protecting the Columbia River Gorge: A Twenty Year Experiment in Land-Use Federalism*, 21 J. LAND USE & ENVTL. L. 219 (2006).

were land use regulations "required to comply with federal law."³⁵⁷ The landowners countered that the ordinances implemented the Gorge Commission's management plan, not the statute authorizing the scenic area itself, and were thus not ordinances "required to comply with federal law."³⁵⁸ They maintained that because the Gorge Commission is a state rather than a federal agency, its management plan was state law, and therefore the management plan and county ordinances were not specifically prescribed by the scenic area act.³⁵⁹ Both the Hood River County Circuit Court and the Oregon Court of Appeals rejected the landowners' arguments, concluding that the ordinances were in fact "required to comply with federal law."³⁶⁰

The Court of Appeals concluded that the Gorge Commission was a regional agency and that the interstate compact that created the Commission had the force of federal law.³⁶¹ The scenic area act authorized the Gorge Commission to promulgate a management plan and to disapprove county land use ordinances that were inconsistent with the plan.³⁶² The court emphasized that the act charged the federal Secretary of Agriculture with approving the Gorge Commission's management plan and with reviewing local land use ordinances to ensure compliance.³⁶³ Although the statute did not prescribe specific county land use ordinances, instead setting out standards similar to Oregon's comprehensive land use planning goals, the court concluded that "when correctly understood as comprehensive land use legislation, [the act] requires a degree of detail and rigor in the management plan and implementing ordinances far transcending the precatory standards set out" on the face of the legislation.³⁶⁴

The Oregon Court of Appeals' interpretation of Measure 37's exception in the Columbia River Gorge context was quite broad. The court relied on the comprehensive nature of the scenic area act to conclude that county ordinances not explicitly required by the federal statute at issue were nonetheless "required to comply with" federal law.³⁶⁵ Although the

357. *Columbia River Gorge Comm'n*, 152 P.3d at 999.

358. *Id.* at 1002.

359. *Id.*

360. *Id.* at 1004.

361. *Id.* at 1003 (citing *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) ("[W]here Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause.")).

362. *Id.* at 1004.

363. *Id.*

364. *Id.*

365. The court did not inquire into the relationship between the ordinance and specific provisions in the Commission's management plan in order to determine whether the restrictions placed on the landowners' property were greater than required by federal law. Instead, the court emphasized the degree of federal oversight provided by the Secretary of Agriculture's review of the management plan and the local ordinances. *Id.* The court appeared to have concluded that any local ordinance approved by the Commission and Secretary fit within Measure 37's exception, regardless of how drastically it restricted a landowner's property. *Id.*

decision may be limited to the factually unique context of the scenic area act, it could also signal the Oregon courts' willingness to interpret Measure 37's exception broadly to include all state statutes passed to comply with comprehensive federal schemes, such as those involving clean water, clean air, and endangered species.

The state of Oregon will also likely interpret Measure 37's exception broadly. In his 2001 opinion, the Attorney General interpreted the parallel exception in Measure 37's precursor, Measure 7, which provided that a local government "may impose, to the minimum extent required, a regulation to implement a requirement of federal law without payment of compensation."³⁶⁶ According to the Attorney General, this exception would have applied to "regulations that give practical effect to something that federal law calls for or demands."³⁶⁷ Under the Attorney General's analysis, state statutes "implement[ing] requirements of federal law" included state statutes protecting endangered species, state clean water, clean air and waste management statutes, and state statutes implementing interstate compacts.³⁶⁸ Not all these state statutes avoided Measure 7's compensation requirement, however, because of the exception's restrictive "to the minimum extent required" language. The Attorney General concluded that "required" meant that a state statute was "called for" by federal law.³⁶⁹ Statutes passed to regulate resources to a standard mandated by the federal government under its Commerce Clause or treaty making authority were "called for" by federal law,³⁷⁰ as were statutes passed by a state to comply with interstate compacts.³⁷¹ But state statutes enacted in order to qualify for federal funds were not "called for" by federal law, because there federal law did not preempt state law, and the state had a choice whether to implement legislation to comply with the federal standard.³⁷² The Attorney General also interpreted the phrase "to

366. Measure 7, *supra* note 2, at § (c); Or. Op. Att'y Gen. 284, *supra* note 113, at *15.

367. *Id.* at *276.

368. *Id.* at *228-38.

369. *Id.* at *302. Any narrower interpretation, reasoned the Attorney General, would make the exception meaningless, because federal law cannot actually require, in the sense of directly commandeering, state regulation. *Id.* at *245 (citing *New York v. United States*, 505 U.S. 144, 178 (1992)).

370. *Id.* at *236.

371. *Id.* at *237.

372. *Id.* The Attorney General also opined Measure 7's federal law exception covered instances beyond those in which a federal statute required states to comply with federal law. According to the Attorney General, the exception might also exempt instances in which a state entered into a contract or other binding commitment to act in compliance with federal law. *Id.* at *16,* 32-*33. The Attorney General reached this conclusion as follows:

Because the limitation "to the minimum extent required" modifies the verb "impose," we conclude that the voters intended the exception in subsection (c) of Measure 7 to apply only if the regulating entity is "required" to impose the regulation. The word "required" has no obvious subject to identify who or what might be requiring the regulating entity to impose the regulation. Intuitively, one might expect that the voters intended to refer to federal law. We are reluctant to conclude, however, that the federal law, the requirements of which are being implemented, is the only source of the regulating entity's mandate to impose the regulation because there is nothing in the actual text of subsection (c)

the minimum extent required” to limit the exception to state laws that were “no broader in scope, in terms of [their] restriction on the use of private real property, than the requirement of federal law being implemented,” and that the restriction was the minimum required of the regulating entity.³⁷³

The language of Measure 37’s exception is potentially narrower than that of Measure 7’s. Measure 37’s provision exempts only those regulations required to “comply with” federal law, which might exclude many laws passed to “implement [] requirement[s] of” federal laws.³⁷⁴ It is therefore possible that state laws passed to retain regulatory control of an area in which federal standards apply, which “implement” federal laws, such as state clean water statutes, are not required to “comply with” federal laws, since Oregon could comply with federal water pollution standards by doing nothing. Given the exception’s ambiguity and the Oregon Appeals Court’s Gorge Commission decision,³⁷⁵ however, it may be just as likely that Oregon courts will interpret the provision to encompass a broad array of state laws implementing federal standards.

D. The Pornography Exception

Section 3(D) of Measure 37 exempts land use regulations “restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing,” while expressly stating that the provision was not intended to “affect or alter rights provided by the Oregon or United States Constitutions.”³⁷⁶ While professing to “take no position on social issues, including pornography,” Measure 37’s proponents included this provision in an effort to preempt arguments by the measure’s opponents that the measure would cause the government to support pornography by requiring it to compensate pornographers for land use laws limiting their ability to do business.³⁷⁷ The baldly political nature of the

to suggest such a limited interpretation. Moreover, if that were what was intended, the sentence could more simply have stated that “a regulating entity may impose a regulation to implement federal law if required to do so by that law.”

Id. at *240-41. Measure 37’s provision exempts land use regulations “to the extent the land use regulation is required to comply with federal law.” Measure 37, *supra* note 1, at § (3)(C). The language, like Measure 7’s, leaves open the possibility that the obligation to comply with federal law may come from a source other than the federal law being implemented.

373. Or. Op. Att’y Gen., *supra* note 113, at *255-56.

374. Measure 37, *supra* note 1, at § 3(C); Measure 7, *supra* note 2, at § (c).

375. Columbia River Gorge Comm’n v. Hood River County, 152 P.3d 997 (Or. Ct. App. 2007), discussed in *supra* notes 354-64 and accompanying text.

376. Measure 37, *supra* note 1, at § 3(D).

377. See Oregonians In Action, Ballot Measure 37, Question & Answers, Question No. 10, available at www.measure37.com/measure%2037/faq.htm (last visited Nov. 8, 2007) (explaining why Oregonians In Action included the section 3(D) exception). Opponents of a 1995 Washington state takings initiative successfully defeated that measure by highlighting that it would require voters to compensate pornographers. See Michael Paulson, *Lawmakers Still Back Land-Use Compensation*, SEATTLE POST-INTELLIGENCER, Nov. 9, 1995, at A1 (quoting state senator as stating that those campaigning against the initiative alleged “that there would be porno shops in your neighborhood”). Oregonians In Action stated on its website that “property rights opponents defeated a takings initia-

exemption is underscored by the fact that regulations specifically targeting pornographic establishments are prohibited under the Oregon Constitution.³⁷⁸ But on the other hand, section 3(D) may itself be unconstitutional because it disadvantages certain property owners (by not requiring compensation for regulations that restrict their use of property) based solely on their protected speech activities.

Neither the Oregon Supreme Court nor the Marion County Circuit Court directly addressed Measure 37's anti-pornography provision.³⁷⁹ However, the Oregon Supreme Court did address the implications of similar anti-pornography provisions contained in Measure 7, which sought to amend the Oregon Constitution.³⁸⁰ Interpreting Measure 7's anti-pornography provision, the Supreme Court noted that the Oregon Constitution prohibits not only regulations that explicitly target expression, but also regulations that treat those who sell expressive material more restrictively than those who sell other merchandise.³⁸¹ The court concluded that by permitting the state and local government to choose not to pay a property owner because of the expressive activity in which she engaged (for example, selling pornography), the measure "essentially plac[ed] a price tag on the property owner's right of free expression" and, consequently changed the scope of the free expression rights guaranteed by Article I, section 8 of the Oregon Constitution.³⁸²

tive in the State of Washington by . . . arguing that voters would be forced to compensate pornographers if the Washington law was adopted. The addition of the 'pornography' exemption was necessary to stop Measure 37 opponents from making the same frivolous, baseless argument against Measure 37." Oregonians In Action, Ballot Measure 37, Question & Answers, Question No. 10, available at www.measure37.com/measure%2037/faq.htm (last visited Nov. 8, 2007).

378. See OR. CONST. art. I, § 8 ("[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."); *Portland v. Tidyman*, 759 P.2d 242, 247, 251 (Or. 1988) (finding city ordinance restricting siting of adult establishments unconstitutional because it was "flatly directed against one disfavored type of pictorial or verbal communication," and because the city had failed to demonstrate that the specific type of communication in question caused invidious effects that would justify its restriction).

379. The Marion County Circuit Court decided that, since none of the plaintiffs challenging Measure 37 proposed to use their property to sell pornography, their free expression challenge to the provision was not justiciable. *MacPherson v. Dep't of Admin. Servs.*, No. 05C10444, slip op. at 17 (Marion County Cir. Ct. Oct. 14, 2005), available at <http://www.ojd.state.or.us/mar/documents/Measure37.pdf>; see also *supra* note 175 (discussing court's dismissal of free expression claim). Plaintiffs do not appear to have appealed the court's dismissal of their free expression claim. See *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 311 (Or. 2006).

380. See *supra* notes 128-35 and accompanying text (discussing *League of Or. Cities v. Oregon*, 56 P.3d 892 (Or. 2002), which concluded that Measure 7 violated the separate vote provisions of the Oregon Constitution by including two constitutional amendments on a single ballot). The inclusion of a pornography exception to its compensation requirement ultimately led to the Oregon Supreme Court's concluding that the measure was unconstitutional. *League of Or. Cities*, 56 P.3d at 910-11.

381. *League of Or. Cities*, 56 P.3d at 908 (citing *City of Eugene v. Miller*, 871 P.2d 454 (Or. 1994)).

382. *Id.* at 909.

The Supreme Court left open the possibility that a “regulation ostensibly directed against expression might pass constitutional muster, provided that such a regulation in fact was directed toward negative effects sought to be prevented and also specified the harm that otherwise would arise if the regulation were not adopted.”³⁸³ Under those circumstances, the Supreme Court thought “it is possible that a governmental entity, today, could craft a regulation that prohibits the use of a property for the purpose of selling pornography without running afoul of Article I, section 8.”³⁸⁴

Although no court has addressed whether Measure 37’s anti-pornography provision passes constitutional muster, it seems hardly likely that it would, since its language is broader than Measure 7’s, including regulations that “restrict” as well as those that “prohibit” pornography and nude dancing.³⁸⁵ Measure 37 also singles out a form of expression for disparate treatment, is not directed at abrogating negative effects incident to that form of expression, and does not articulate what the harms that would be avoided might be.³⁸⁶

The Marion County Circuit Court did address whether Measure 37’s pornography exemption is severable from the measure’s other provisions, concluding that the provision, even if unconstitutional, could be severed from the measure pursuant to Measure 37’s savings clause.³⁸⁷ Oregon courts honor express severability provisions in “a manner that best reflects the intentions of the voters.”³⁸⁸ Measure 37’s legislative history, including the ballot pamphlets and surrounding press, offers no insight into the voters’ intent with respect to the measure’s savings clause. Interpreting a similar savings clause in different ballot measure, however, the Oregon Supreme Court indicated that it will interpret savings clauses broadly as a directive by the voters to the courts to “clean-

383. *Id.*

384. *Id.*

385. Measure 7’s provision exempted only those regulation that “prohibited” the use of property for the selling of pornography or nude dancing. Measure 7, *supra* note 2, at § (c). Interpreting the language of the provision, the Attorney General concluded that “only those regulations that expressly prohibit the listed activities” were exempt from the measure’s compensation requirement. *See Or. Op. Att’y. Gen.*, *supra* note 113, at *5, *87. “Regulations that merely restrict those activities or make them impractical are not within the exception.” *Id.* at *88.

386. *See Portland v. Tidyman*, 759 P.2d 242, 251 (Or. 1988); *Miller*, 871 P.2d at 460 (setting out parameters for constitutionally permissible statutes that target, or disparately effect, constitutionally protected expression).

387. *See supra* note 175 (discussing Marion County Circuit Court’s dismissal of Plaintiffs’ claim that Measure 37 violated the Oregon Constitution’s free expression provisions); Measure 37, *supra* note 1, at § 13 (providing “if any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect”).

388. *See, e.g.*, *Advocates for Effective Regulation v. City of Eugene*, 32 P.3d 228, 231 (Or. App. 2001) (citing *PGE v. Bureau of Labor and Indus.*, 859 P.2d 1143 (Or. 1993), and interpreting a severability clause of city ballot initiative regarding disclosure of information about hazardous waste, severing several unconstitutional portions of the initiative from the remaining provisions); *Vannatta v. Keisling*, 931 P.2d 770, 789 (Or. 1997) (severing from political campaign finance initiative certain provisions that violated Oregon Constitution’s free expression guarantees).

up” an initiative’s unconstitutional elements.³⁸⁹ On the whole, then, it seems likely that while Measure 37’s anti-pornography provision violates the free expression clause of Oregon’s Constitution, it could be severed, saving the remaining provisions of the measure.

E. Laws Enacted Prior to the Acquisition of Property

Section 3(E) of Measure 37 exempts from its compensation requirement land use regulations enacted “prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.”³⁹⁰ The exception excuses the government from compensating some landowners, but it also extends Measure 37’s compensation requirement potentially deep into the past because it grants to current owners the right to compensation for land use laws passed not only during their tenure as owners but also for those passed during the tenure of their family members.³⁹¹ The “inheritance right” created by this exception has no equal in other states, or even in Oregon’s intestacy laws.³⁹²

The provision leaves a number of questions unanswered. Among them are whether the exception requires a family to hold property continuously, or whether it would also apply to situations where property is sold to a non-family member but subsequently reacquired by the family; whether the provision applies to corporations that transfer property among sister corporate entities; and how the exception interacts with the measure’s waiver provisions. The last uncertainty—whether owners of property subject to a land use law enacted prior to their acquisition of the property but during the tenure of a family member’s ownership are entitled to a waiver of that law if government chooses not to compensate—has perhaps the most far-reaching implications. On the one hand, section 3(E) back-dates an owner’s “acquisition” of property for purposes of the measure’s compensation requirement to the date on which a family member acquired the property. The measure’s waiver provision, however, allows governments to waive land use regulations only “to allow the owner to use the property for a use permitted at the time the owner

389. *Vannatta*, 931 P.2d at 789 (interpreting a savings clause that read “[I]f any part of this Act is held unconstitutional, the remaining parts shall remain in force unless the court specifically finds that the remaining parts, standing alone, are incomplete and incapable of being executed” as a directive from the voters to sever those provisions that were unconstitutional and clean up the rest of the measure in order for it to make sense without those provisions).

390. Measure 37, *supra* note 1, at § 3(E).

391. The measure defines “family member” expansively. *See id.* § 11(A). Present owners of property may be entitled to compensation if the government enforces land use laws enacted at any time before a family member—including distant family members related by marriage, such as step-grandparents in-law—acquired the property. *See supra* notes 160-61 and accompanying text (discussing measure’s retroactive reach).

392. *See supra* note 160 (discussing Oregon intestacy law); *supra* notes 114, 225, 227 (discussing other states’ regulatory takings legislation); and *infra* notes 402-49 and accompanying text (discussing other states’ ballot measures).

acquired the property,” making no mention of an inheritance right.³⁹³ If, for example, a property owner who acquired property in 1990 from her father (who in turn acquired the property in 1970) filed a Measure 37 claim seeking compensation for a 1980 provision that prevented her from subdividing her land, would a government be barred from waiving that 1980 regulation and thereby allowing the subdivisions? Or would a government be limited to waiving only those land use restrictions dating back to 1990, the “time the owner acquired the property” and, if so, would such a waiver satisfy the government’s compensation requirement under Measure 37?

At least one court has addressed these questions, answering both in the affirmative. In *Cobos v. Marion County*,³⁹⁴ Judge Thomas M. Hart of the Marion County Circuit Court concluded that Measure 37 provides for two distinct and potentially separate dates—one for calculating compensation owed for land use restrictions that devalue property, and another for determining which land use regulations apply when a government waives land use regulations rather than compensating an owner.³⁹⁵ The *Cobos* case concerned a Measure 37 claim filed by property owners in Marion County who had inherited two parcels of property, one in 1999 and one in 2001, from family members who had, in turn, inherited the parcels from other family members who had purchased the properties in 1946.³⁹⁶ The county responded to the claims by exercising its option under section 8 of Measure 37 to waive applicable land use restrictions rather than compensate the landowners; however, it waived only the land use restrictions to which the parcels became subject after 1999 and 2001, the respective dates upon which the present owners acquired the properties, continuing to apply land use restrictions enacted prior to the present owners’ acquisition of the property.³⁹⁷

Judge Hart upheld the county’s actions against a challenge by the property owners, concluding that (1) section 8 authorizes governments to waive land use restrictions in response to Measure 37 claims only to the extent that doing so allows the owner to “use the property for a use permitted at the time the owner acquired the property”;³⁹⁸ (2) “the portion of the statute that permits an owner to recover just compensation for land use regulations enacted during a family member’s tenure [section 3(E)] is limited in application to section 1 [the compensation provision] of the

393. Measure 37, *supra* note 1, at § 8 (stating that “the governing body responsible for enacting the land use regulation may modify, remove, or not apply the land use regulation . . . to allow the owner to use the property for a use permitted at the time the owner acquired the property”).

394. *Cobos v. Marion County*, No. 05C16640 (Marion County Cir. Ct., July 11, 2006) (Letter Opinion), available at http://www.doj.state.or.us/hot_topics/measure37litigation.shtml (last visited Nov. 8, 2007).

395. *Id.*

396. *Id.* at Ex. B, 1.

397. *Id.*

398. *Id.* at Ex. B, 2.

statute”;³⁹⁹ (3) the measure contains no comparable provision that “makes the waiver provision applicable to rules that became effective during ownership by the current owner’s family member”;⁴⁰⁰ and (4) a government has full discretion whether or not to waive a land use law (so that the owner may use her property as she could have on the date she acquired it) or compensate an owner for lost value due to a land use law (enacted after she, or one of her family members, acquired the property).⁴⁰¹ The plaintiffs did not appeal Judge Hart’s decision. Commentators, including Measure 37’s drafters, seem to agree that while a current owner’s right to compensation extends to land use laws enacted during the prior ownership tenancy of the claimant’s family, a government can waive only those land use laws enacted subsequent to the time the current owner acquired the property, and that such a waiver completely satisfies a claim under Measure 37.⁴⁰²

399. *Id.* (“section 3(E) limits the payment provision of section 1 to those situations in which the current owner or a family member of the current owner acquired the property before the offending land use regulations became effective”).

400. *Id.* Judge Hart stated that “to the extent the exception contained in section 3(E) could possibly have been understood to apply to section 8, the specific language in section 8 regarding who may obtain the non-application of land use rules indicates a particular intent to limit such a waiver to the current owner.” *Id.* at Ex. B, 5.

401. *Id.* at Ex. B, 3 n.4 (citing Measure 37 §§ 8, 10). According to Judge Thomas Hart’s interpretation, a government could avoid paying potentially large amount of compensation for land use laws going back many years by waiving only those land use laws of more recent vintage that have been enacted since the claimant acquired land. Judge Hart’s responded to the landowner’s complaints that this result “deprives property owners of the ‘substantive rights granted in Section 1’” by stating that:

no substantive rights related to non-application of land use rules were granted in section 1 of the statute. That portion of the statute addresses only the monetary compensation granted to property owners. In contrast, Sections 8 and 10 grant public entities discretion to not apply the land use rules instead of compensating the owners. If a public entity chooses this route, only sections 8 and 10 of the statute are relevant, and any exceptions to section 1, including the exception that entitles a current property owner to compensation if the owner’s family member owned the property at the time the land use rules became effective, are inapplicable.

Id. at Ex. B, 6.

402. Oregonians In Action, the organization largely responsible for drafting and supporting Measure 37, stated in the “Frequently Asked Questions” section of its website: “Measure 37 distinguishes between compensation claims and waiver claims. Compensation claims revert to the date property was acquired by the family member. A claim for a waiver reverts to the date the *present owner* acquired the property.” Oregonians In Action website, Frequently Asked Question No. 23, <http://www.measure37.com/measure%2037/faq.htm#22> (last visited Nov. 9, 2007); *see also* Sommers, *supra* note 162, at 216-17 (same). David Hunnicutt, Oregonians In Action’s executive director, explained in a 2005 speech that this distinction had been adopted by the drafters in order to undercut potential arguments by the measure’s opponents. *See* David J. Hunnicutt, Executive Director, Oregonians In Action, Oregon Law Institute Conference Speech at the “Measure 37 Summit” (Jan. 5, 2005) (stating “at the time that the Measure was drafted we were afraid that we would face the argument that if you go back two generations then . . . counties would have to allow people to use land in the way that grandpa could have done it when grandpa purchased the property in 1890 . . . [t]hat being the case . . . we thought it would make it more difficult to pass the Measure . . . [w]e wanted to take that argument away from the opponents”), *available at* http://www.doj.state.or.us/hot_topics/pdf/measure37/cobos_msj.pdf (last visited Nov. 9, 2007) (ex. D to State of Oregon Motion for Summary Judgment in *Cobos v. Marion County*, No. 05C16640 (Marion County Cir. Ct. July 11, 2006)).

V. EXPORTING MEASURE 37

The November 2006 election cycle saw voters decide a host of property rights ballot measures around the country. Most of these measures proposed limiting the circumstances in which state governments could exercise their eminent domain power.⁴⁰³ These measures were a direct response to the Supreme Court's 2005 decision in *Kelo v. City of New London*,⁴⁰⁴ which upheld against a Fifth Amendment challenge the city of New London's condemnation and transfer of property from one private party to another for the "public use" of economic development.⁴⁰⁵ These citizen initiatives aimed at limiting state condemnation power rode a strong current of public opposition to the perceived implications of the *Kelo* decision.⁴⁰⁶ During the November 2006 elections, voters overwhelmingly adopted measures restricting states' eminent domain power in every state in which a pure-*Kelo*⁴⁰⁷ initiative was on the ballot.⁴⁰⁸

California, Idaho, and Arizona also saw property rights reform measures on their November 2006 ballots.⁴⁰⁹ The measures in these

403. See, e.g., Ballot Question No. 2 (Nev. 2006) (proposing constitutional amendment providing that transfer of property from one private property to another is not a public use); Amendment 5 (La. 2006) (same; appeared on primary ballot); Initiated Constitutional Amendment 2 (N.D. 2006) (same); Constitutional Amendment 8 (Fla. 2006) (same); Constitutional Amendment 1 (Ga. 2006) (same); Constitutional Amendment 5 (S.C. 2006) (same); Ballot Proposal 4 (Mich. 2006) (statutory amendment); Ballot Question 1 (N.H. 2006) (same); Ballot Measure 39 (Or. 2006) (same); see also National Conference of State Legislatures, Property Rights Issues on the 2006 Ballot, http://www.ncsl.org/statevote/prop_rights_06.htm (describing measures, giving vote outcomes, and linking to description of provisions).

404. 545 U.S. 469 (2005).

405. In *Kelo*, the Court, in a 5-4 opinion, ruled that government may exercise its power of eminent domain to condemn privately-owned property, even where that property will eventually be transferred to another private entity, so long as the government's exercise of its condemnation authority furthers public economic objectives. *Kelo*, 545 U.S. at 484-86, 489-90; see Corinne Calfee, *Kelo v. City of New London: The More Things Stay The Same, The More They Change*, 33 *ECOLOGY L.Q.* 545, 579-81 (2006) (analyzing the *Kelo* decision and describing its aftermath); Amanda Goodin, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 *N.Y.U. L. REV.* 177, 195-96 (2007) (same); Richard Dolesh & Douglas Vaira, *Property Rights and Wrongs*, *PARKS & RECREATION*, Mar. 1, 2007, at 58, available at <http://www.nrpa.org/content/default.aspx?documentId=6040> (describing *Kelo* backlash).

406. See A.L.I.—A.B.A., CONDEMNATION 101: FUNDAMENTALS OF CONDEMNATION LAW AND LAND VALUATION: LEGISLATIVE ACTION SINCE *KELO* 344-57 (2006) (describing, state-by-state, legislative measures aimed at curbing "abuse" of eminent domain for private economic use and noting that 34 states had passed such laws by January 2007); Donald E. Sanders & Patricia Pattison, *The Aftermath of Kelo*, 34 *REAL EST. L.J.* 157, 168-70 (2005) (describing the backlash to *Kelo*); Kimberly M. Watt, Comment, *Eminent Domain, Regulatory Takings, and Legislative Responses in the Post-Kelo Northwest*, 43 *IDAHO L. REV.* 539, 577-82 (2007) (same; focusing on Idaho's legislative responses to *Kelo*).

407. As opposed to a hybrid eminent domain-regulatory takings initiatives, discussed *infra* notes 409-11.

408. See National Conference of State Legislatures, *supra* note 403, (providing voting results).

Nevada's measure must be approved a second time by voters, under Nevada's constitutional requirement that initiatives proposing constitutional amendments be approved by voters in two successive elections. See NEV. CONST. art. 19, § 2(4).

409. Proposition 90 (Cal. 2006); Proposition 2 (Id. 2006); Proposition 207 (Az. 2006).

Montana's Ballot Initiative 154, another "*Kelo*-plus" initiative, was struck from the ballot because of irregularities in the manner out-of-state signature gatherers obtained the signatures needed

states, so-called “*Kelo-plus*”⁴¹⁰ initiatives, contained both eminent domain reform provisions as well as Measure 37-type regulatory takings reforms.⁴¹¹ In addition, Washington saw an initiative that invoked *Kelo* in its preamble but actually contained only Measure 37-type regulatory

to place the initiative on the ballot. *Montanans for Justice v. State*, 146 P.3d 759, 775-76 (Mont. 2006) (referring to the “bait and switch” tactics of signature gatherers).

Missouri also saw a citizen initiative to place a “*Kelo-plus*” measure on its ballot. That initiative also foundered on irregularities in the manner in which signatures were submitted and in the fiscal note summary of the initiative, and the secretary of state refused to place it on the ballot. See *Crim v. Sec’y of State*, No. 06AC-CC00211 (Mo. 19th Jud. Cir. Ct. Apr. 27, 2006); Kit Wagar & Steve Kraske, *State Ballot Issues Rejected*, KANSAS CITY STAR, May 26, 2006.

Nevada’s Ballot Question 2 initially also contained Measure 37-like provisions, but they were struck from the ballot by the Nevada Supreme Court, which concluded that the inclusion of both eminent domain and regulatory takings provisions in one ballot initiative violated a Nevada constitutional provision that limits ballot initiatives to a single subject. The Nevada Supreme Court allowed the eminent domain portion of the initiative to be placed on the ballot. See generally *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 141 P.3d 1235 (Nev. 2006).

In Oklahoma, the state supreme court struck a “*Kelo-plus*” ballot initiative completely from the ballot for violating the Oklahoma Constitution’s provision limiting ballot measures to a single subject. See *In re Initiative Petition No. 382*, 142 P.3d 400, 409 (Okla. 2006); John Greiner, *Court Rules Against Petition on Eminent Domain Protection*, DAILY OKLAHOMAN, June 21, 2006, available at 2006 WLNR 10719516.

410. Combining eminent domain and regulatory takings reform in a single ballot measure was controversial, and potentially politically risky. See, e.g., Leonard Gilroy, *By a Landslide, Americans Voted to Protect Their Property*, BUFFALO NEWS, Nov. 19, 2006, at 12, available at 2006 WLNR 20139782 (stating that “*Kelo-plus*” initiatives were a more difficult political sell because, while most people agreed with limiting state eminent domain power, regulatory takings reform had strong opposition); Dolesh & Vaira, *supra* note 405, at 1 (discussing “*Kelo-plus*” measures).

411. California Proposition 90, §§ 3, 19(a)(1), (b)(8) (2006) available at http://www.voterguide.sos.ca.gov/pdf/prop90_text.pdf (last visited Nov. 9, 2007). California’s Proposition 90 amended the state constitution, burying its regulatory takings clause within the eminent domain reforms. It provided that “[p]roperty may not be taken or damaged for private use” and then defined “damaged” to include “government actions that result in substantial economic loss to private property,” including “downzoning” and “limitations on the use of private air space.” *Id.* (emphasis added). For a detailed description of Proposition, see generally RICHARD M. FRANK, ALL-ABA INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY, PROPOSITION 90: AN ANALYSIS 669-731 (2007) (describing history of Proposition 90 and analyzing its provisions).

Idaho’s Proposition 2 contained eminent domain provisions that would have amended Idaho statute to prohibited the state from using eminent domain to acquire property “if at the time of the condemnation, the public body condemning the property, or its designee, intends to convey fee title to all or a portion of the real property, or a lesser interest than fee title, to another private party.” Idaho Proposition 2, § 1 (2006) available at <http://www.sos.idaho.gov/elect/inits/06init08.htm> (last visited Nov. 9, 2007). Its regulatory takings section would have amended Idaho statutes to provide:

If an owner’s ability to use, possess, sell, or divide private real property is limited or prohibited by the enactment or enforcement of any land use law after the date of acquisition by the owner of the property in a manner that reduces the fair market value of the property, the owner shall be entitled to just compensation, and shall not be required to first submit a land use application to remove, modify, vary, or otherwise alter the application of the land use law as a prerequisite to demanding or receiving just compensation under subsection (9) of this section.

Id. § 4 (providing for cause of action where a “land use law continues to apply to private real property more than 90 days after a written demand for just compensation”). Arizona’s Proposition 207 amended Arizona statute to redefine “public use” for purposes of the state’s exercise of eminent domain to exclude “the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health.” Arizona Proposition 207, sec. 3, § 12-1136(5)(b) (codified at ARIZ. REV. STAT. ANN. § 12-1136(5)(b)) (2006) available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop207.htm>. Proposition 207’s regulatory provisions are discussed further *infra* at notes 426-32 and accompanying text.

reform provisions and no eminent domain reform provisions.⁴¹² Of these mixed eminent domain/regulatory takings initiatives, only Arizona's succeeded.⁴¹³

A. Regulatory Takings Initiatives

The regulatory takings portions of the Washington, Idaho, California, and Arizona initiatives were outgrowths of Measure 37.⁴¹⁴ Each measure included provisions similar to Measure 37—guaranteeing just compensation to landowners who suffered any diminution in property value as result of government regulation.⁴¹⁵ The campaigns in support of each of these measures received a significant portion of their funding from organizations affiliated with Howard Rich, a New York-based real

412. Washington Ballot Initiative 933 (2006) available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf> (last visited Nov. 9, 2007). Washington's initiative invoked *Kelo* by stating that "[t]he people find that eminent domain is . . . potentially subject to misuse" and that government "should not take property which is unnecessary for public use or is primarily for private use" but contained only regulatory takings provisions and not any provisions limiting the state's eminent domain powers. *Id.* § 1.

413. Idaho voters resoundingly defeated Proposition 2 by a margin of 76 percent to 24 percent. BEN YSURSA, 2006 GENERAL RESULTS STATEWIDE (2006), http://www.idsos.state.id.us/ELECT/RESULTS/2006/general/tot_stwd.htm (last visited Nov. 9, 2007). Washington's voters soundly defeated Initiative 933 by a margin of 59 percent to 41 percent. SAM REED, 2006 GENERAL ELECTION RESULTS (2006), <http://vote.wa.gov/Elections/general/Measures.aspx> (last visited Nov. 9, 2007). California voters more narrowly defeated Proposition 90 by a margin of 52.4 percent to 47.6 percent. STATE BALLOT MEASURES 76 (2006), http://www.ss.ca.gov/elections/sov/2006_general/measures.pdf (last visited Nov. 9, 2007).

414. Measure 37's drafters reportedly helped draft other state's measures. See Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1526 (2007) (noting that Measure 37's drafters aided drafters of other states' initiatives, citing personal interview with the other states' drafters); Patty Wentz, *This Land Is Their Land*, WILLAMETTE WK., Nov. 28, 2000, at 21 (describing how Measure 7's drafters, the same as Measure 37's, lectured in other states); Laura Oppenheimer, *Measure 37 Proclaims: Subdivide and Conquer*, OREGONIAN, June 12, 2005, at A1 (describing how Measure 37's drafters traveled to other states, where they were greeted as "the Madonnas and Oprahs of property rights"); see also LEONARD C. GILROY, STATEWIDE REGULATORY TAKINGS REFORM: EXPORTING OREGON'S MEASURE 37 TO OTHER STATES I (2006) (describing Measure 37 and strategies for exporting the measure to other states), available at <http://www.reason.org/ps343.pdf>.

415. Washington Ballot Initiative 933, §§ 2(2)(a), (b), (d) (2006) available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf> (last visited Nov. 9, 2007); Idaho Proposition 2, §§ 4(5), 6(e) (2006) available at <http://www.sos.idaho.gov/elect/inits/06init08.htm> (last visited Nov. 9, 2007); California Proposition 90, §§ 3, 19(a)(1) (2006) available at http://www.voterguide.sos.ca.gov/pdf/prop90_text.pdf (last visited Nov. 9, 2007); Arizona Proposition 207, sec. 3, § 12-1134(a) (codified at ARIZ. REV. STAT. ANN. § 12-1134) (2006) available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop207.htm> (last visited Nov. 9, 2007). Idaho and California's provisions were not retroactive. Idaho Proposition 2, §§ 4(5), 6(e) (2006) available at <http://www.sos.idaho.gov/elect/inits/06init08.htm> (last visited Nov. 9, 2007); California Proposition 90, §§ 3, 6 (2006) available at http://www.votersguide.sos.ca.gov/pdf/prop90_text.pdf (last visited Nov. 9, 2007). Idaho's measure applied only to land use regulations enacted after an owner acquires the property and after the enactment of the measure—they applied only to regulations passed after the effective date of the initiatives. Idaho Proposition 2, §§ 4(5), 6(e) (2006) available at <http://www.sos.idaho.gov/elect/inits/06init08.htm> (last visited Nov. 9, 2007). Similarly, California's measure applied only to property devalued after the measure took effect. California Proposition 90, § 6 (2006) available at http://www.voterguide.sos.ca.gov/pdf/prop90_text.pdf (last visited Nov. 9, 2007). For a description of Arizona's and Washington's measures, see *infra* notes 418-32 and accompanying text.

estate developer and libertarian activist.⁴¹⁶ By some estimates, Rich spent nearly \$9 million on property rights initiatives in eight states,⁴¹⁷ including over \$1.2 million in support of the Arizona initiative, \$3.3 million in support of the California initiative, \$800,000 in support of the Idaho initiative, and \$360,000 in support of the Washington initiative.⁴¹⁸

Washington's failed Initiative 933 was the most radical of the proposed ballot initiatives. Although the initiative's language was ambiguous in many places, it contained a number of provisions potentially even more sweeping in scope than Oregon's Measure 37.⁴¹⁹ Its compensation requirement applied to regulations limiting the value of personal as well as real property.⁴²⁰ The initiative exempted neither regulations to abate public nuisance nor regulations to implement federal law, and its health and safety exemption was more narrowly tailored than Measure 37's.⁴²¹ The scope of government's authority to waive offending regulations rather than pay compensation to owners was unclear. Unlike Measure 37,⁴²² the initiative did not expressly vest governments with authority to waive offending regulations, stating instead that its compensation provision was "not [to] be construed to limit agencies' ability to waive, or issue variances from, other legal requirements."⁴²³ The initiative also

416. See David Crary, *Wealthy New Yorker's Reach Felt Here; Howard Rich Helps Fund Campaign for Initiative 933*, COLUMBIAN (Vancouver, Wash.), Oct. 27, 2006, at C7 (describing Rich's involvement in campaigns); JOHN O'DONNELL, PUBLIC CITIZEN, TAKING THE PUBLIC TRUST: HOW A NEW YORK STATE REAL ESTATE DEVELOPER IS THREATENING STATE GOVERNMENTS IN THE WEST 7-8 (2006) (describing funding and groups affiliated with Rich, including Americans for Limited Government, the Fund for Democracy, the Club for Growth, the Club for Growth State Action, Colorado at its Best, U.S. Term Limits, Montanans in Action).

417. O'DONNELL, *supra* note 416, at 7-8 (listing Arizona, California, Idaho, Missouri, Montana, Nevada, Oklahoma, and Washington).

418. *Id.* at 8; see also Curt Woodward, *Land Use Showdown*, COLUMBIAN (Vancouver, Wash.), Oct. 23, 2006, at C2 (stating that as of the date of the article, initiative 933 supporters had raised nearly \$800,000 and opponents had raised nearly \$2.6 million).

419. See, e.g., Eric De Place & Val Alexander, Editorial, *In My Opinion—Initiative 933—For Washington, It's Measure 37 on Steroids*, OREGONIAN, Aug. 8, 2006, at B09 (arguing that the scope of the initiative would be broader than Measure 37).

420. Washington Ballot Initiative 933, § 2(2)(a) (2006) available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf> (last visited Nov. 9, 2007). Initiative 933 defined "private property" subject to its compensation mandate to include "all real and personal property interests protected by the fifth amendment of the United States Constitution or Article I, section 16 of the state Constitution owned by a nongovernmental entity, including, but not limited to, any interest in land, buildings, crops, livestock, and mineral and water rights." *Id.*

421. Compare *id.* § 2(2)(c)(i) with OR. REV. STAT. § 197.352(3) (2005). The Washington initiative exempted regulations "restricting the use of property when necessary to prevent an immediate threat to human health and safety." Washington Ballot Initiative 933 § 2(2)(c)(i) (2006) available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf> (last visited Nov. 9, 2007). But it contained no express exemptions for regulations limiting public nuisance activities or implementing federal law. *Id.* § (2)(2)(c).

422. Measure 37, *supra* note 1, at § 8.

423. Washington Ballot Initiative 933, *supra* note 415, at § 3. Initiative 933's compensation provision provided in its entirety:

An agency that decides to enforce or apply any ordinance, regulation, or rule to private property that would result in damaging the use or value of private property shall first pay the property owner compensation as defined in section 2 of this act. This section shall not be construed to limit agencies' ability to waive, or issue variances from, other legal

may have compensated owners regardless of whether they acquired their property before or after the offending regulation was enacted.⁴²⁴ In one sense, however, Initiative 933 may have been more limited than Measure 37: unlike Measure 37, which reached back to provide compensation for any regulations passed after a landowner acquired her property, Initiative 933 might have limited its compensation requirement to restrictions passed after 1996.⁴²⁵ The initiative was so ambiguously drafted, however, that it was not clear whether the 1996 cut-off applied to all offending regulations or to just certain types.⁴²⁶

Arizona's Proposition 207 also mirrored Measure 37. It obligated the state or its political subdivisions⁴²⁷ to compensate property owners for any land use law enacted after the date on which property was transferred to a landowner that reduces the "fair market value" of the property.⁴²⁸ Like Measure 37, the proposition explicitly allowed the state to

requirements. An agency that chooses not to take action which will damage the use or value of private property is not liable for paying remuneration under this section.

Id.; see also Amy Rolph, *Study Puts I-933's Cost in Billions But Backers of Land-Use Measure Deride UW Report*, SEATTLE POST-INTELLIGENCER, Sept. 27, 2006, at B1 (citing a University of Washington study concluding, among other things, that government would not be able to waive certain environmental laws under the initiative and would be forced to compensate landowners for diminution in value caused by the regulations, at great financial cost to the state). See generally Dolesh & Vaira, *supra* note 405, at 61 (discussing waiver of rules in place of compensation).

424. Washington Ballot Initiative 933, *supra* note 420, at § 3. Initiative 933 made no reference to the time property was acquired, providing only that "[a]n agency that decides to enforce or apply any ordinance, regulation, or rule to private property that would result in damaging the use or value or private property shall first pay the property owner compensation . . ." *Id.*; see also Eric Pryne, *Measure 37 and I-933: How They Stack up*, SEATTLE TIMES, Oct. 12, 2006, at A14 (discussing the difference between Measure 37's compensation for regulations passed after an owner acquires property and Initiative 933's provision).

425. Washington Ballot Initiative 933, *supra* note 420, at § 2(2)(b)(i).

426. *Id.* The initiative provided that regulation "[p]rohibiting or restricting any use or size, scope, or intensity of any use legally existing or permitted as of January 1, 1996." *Id.* Without including any date restrictions, the provision listed five other types of regulation that would require compensation including regulations "requiring a portion of property to be left in its natural state or without beneficial use to its owner"; "prohibiting maintenance or removal of trees or vegetation"; and maintenance of infrastructure, such as bulkheads and tidegates, "reasonably necessary for the protection of the use or value of private property." *Id.* at §§ 2(2)(b)(ii), (v), (vi). Whether government would have had to compensate landowners for pre-1996 regulations of these types was not clear. See, e.g., Eric Pryne, *Your Guide to Initiative 933*, SEATTLE TIMES, Oct. 16, 2006, at A8, A14 (describing the ambiguities in the initiative's wording and citing Richard Stephens, one of the initiative's drafters, to the effect that the last five categories of the provision were simply examples of regulations covered by the first category, so the 1996 date would also apply to them and noting that "most lawyers studying I-933 said it would require compensation for at least some pre-1996 regulations").

427. Arizona Proposition 207, *supra* note 415, at sec. 3, § 12-1134(a). Proposition 207 obligates the state or "the political subdivision of th[e] state that enacted" the offending land use law to compensate property owners. *Id.* This differs from Measure 37, which imposes the obligation on state entities that "enact[] or enforce[]" the law. Measure 37, *supra* note 1, at § 1.

428. Arizona Proposition 207, *supra* note 415, at sec. 3, § 12-1134(a). Section 3 of the proposition added a "Private Property Rights Protection Act" to the Arizona statutes. Its Measure 37-like provision provides:

If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the

waive land use laws rather than pay compensation.⁴²⁹ Proposition 207 also excepted from its compensation requirement land use restrictions (1) for public health and safety, (2) prohibiting public nuisances under common law, (3) required by federal law, and (4) prohibiting use of property for the sale of pornography and for certain other uses deemed undesirable, such as the sale of liquor or housing of sex offenders.⁴³⁰ It also excepted land use regulations establishing locations for utility facilities and regulations that “do not directly regulate an owner’s land.”⁴³¹ Unlike Measure 37, the proposition expressly provided that waivers “run with the land,” and are thus transferable to subsequent property owners.⁴³² Perhaps most significantly, unlike Measure 37, Proposition 207 was not retroactive—it exempted from its compensation requirement any regulations that were enacted before its effective date.⁴³³

B. The Political Landscape

Some observers attributed Arizona voters’ adoption of Proposition 207 to the fact that the Arizona business community supported the measure, the measure’s inclusion of eminent domain reform as well as regulatory takings provisions, and a successful advertising campaign which, reminiscent of the Measure 37 campaign, adopted the theme of “Keep What You Own” and highlighted injustices to women, the elderly, and minority homeowners.⁴³⁴

Opponents challenged the Arizona measure, claiming that it violated a provision of the Arizona Constitution requiring ballot initiatives to identify the sources of revenues that will fund the immediate and fu-

owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

Id.

429. *Id.* § 12-1134(E) (providing that state or local government may “amend[], repeal[], or issue[] to the landowner a binding waiver of enforcement of the land use law on the owner’s specific parcel”). Neither the California nor Idaho initiatives would have allowed the state to waive enforcement of the land use law rather than waive it, although Washington’s initiative would have permitted the state to do so. California Proposition 90, *supra* note 415 (no waiver provision); Idaho Proposition 2, *supra* note 415 (same); Washington Ballot Measure 933, *supra* note 415 (including compensation provision but providing “[t]his section shall not be construed to limit agencies’ ability to waive, or issue variances, from other legal requirements. An agency that chooses not to take action which will damage the use or value of private property is not liable for paying remuneration under this section.”).

430. Arizona Proposition 207, *supra* note 415, at sec. 3, § 12-1134(B)(1) to (4).

431. *Id.* § (B)(5) to (6).

432. *Id.* § (F) (providing that “any demand for landowner relief or any waiver that is granted in lieu of compensation runs with the land”).

433. *Id.* § (B)(7) (exempting land use regulations that “were enacted before the effective date of this section”).

434. See William Fulton, *Despite Defeat of Prop 90, More Voting on Land Use Restrictions Is Likely* (CALIFORNIA PLANNING & DEVELOPMENT REPORT), Dec. 2006 at 1, available at http://goliath.ecnext.com/coms2/gi_0199-6118926/Despite-defeat-of-Prop-90.html#abstract (comparing the California and Arizona campaigns); Dolesh & Vaira, *supra* note 405, at 61-62 (attributing victory to infusion of out-of-state money and inclusion of less controversial eminent domain provisions).

ture costs of an initiative.⁴³⁵ But a lower court rejected the challenge, and the Arizona Supreme Court affirmed on the ground that violations of the revenue-source provision are not subject to pre-election review and could be maintained only after initiative adoption.⁴³⁶ Despite these challenges, which may be raised again now that the measure has passed, observers noted that opponents of the initiative failed to wage a strong campaign in opposition.⁴³⁷

The defeats of the ballot initiatives in Idaho, Washington, and California were due to a variety of causes. In Idaho, where the initiative lost by the largest margin of any state, observers attributed the defeat to the opponents' effective coalition building and advertising, proponents' lack of organization, and the fact that Idaho already had legislation limiting the state's eminent domain powers.⁴³⁸ Although both sides had about the same amount of money,⁴³⁹ opponents of the initiative formed a broad coalition that included conservationists and environmentalists as well as realtors and other business groups, such as the Idaho Association of Commerce and Industry and the Idaho Association of Realtors.⁴⁴⁰ This coalition launched a successful advertising campaign, featuring ranchers, dairy farmers, and prominent Idaho politicians from both political parties

435. League of Ariz. Cities and Towns v. Brewer, 146 P.3d 58, 59 (Ariz. 2006).

436. *Id.* at 59, 63 (concluding that Arizona courts may only review ballot measures prior to their adoption for violations of ballot form and signature requirements, and may not pass on their constitutionality until they are adopted by the voters). See generally Howard Fisher, *Justices Approve 3 Ballot Measures*, ARIZONA DAILY STAR, Sept. 1, 2006, at B11 (describing the case); *Property Rights Ruling Good News for State's Voters*, YUMASUN.COM, Aug. 21, 2006, <http://sun.yumasun.com/google/ysarchive22864.html> (describing the lower court's ruling).

437. See Dolesh & Vaira, *supra* note 405, at 62 (stating "[t]he general consensus is that Arizona's environmental and land conservation community was not prepared to wage the knock-down fight that proponents brought to the state").

438. The Idaho legislature adopted House Bill 555 in March 2006. Limitation on Eminent Domain for Private Parties, Urban Renewal or Economic Development Purposes, 2006 Idaho Sess. Laws 96 (codified at IDAHO CODE ANN. § 7-701A) (announcing adoption of House Bill 555)). The bill provided that "[e]minent domain shall not be used to acquire private property . . . [f]or any alleged public use which is merely a pretext for the transfer of the condemned property to or any interest in that property to a private party; or . . . for the purpose of promoting . . . economic development." IDAHO CODE ANN. § 7-701A(2)(a)-(b) (2007). As opponents of the measure—who included Idaho's governor—pointed out, Proposition 2's eminent domain provisions were taken nearly verbatim from the already-enacted legislation. See Lora Volkert, *Idaho Governor Against Proposition 2*, IDAHO BUS. REV., Oct. 16, 2006 (citing Gov. Jim Risch's opposition to the proposition and suggesting that its eminent domain measures were redundant).

439. Rocky Barker, *Opposition Groups Close to Matching Prop 2 Support Funds*, IDAHO STATESMAN, Nov. 2, 2006, at 2 (noting that at that time proponents had raised about \$810,000, the vast majority from Howard Rich, while opponents had raised about \$755,000).

440. See Ray Ring, *The West: A New Center of Power*, HIGH COUNTRY NEWS (Paonia, Colorado), Nov. 27, 2006, at 10 (describing defeat of Idaho Proposition 2); Lora Volkert, *Idaho Voters Kill Proposition 2*, IDAHO BUS. REV., Nov. 13, 2006 (same); Bruce Ramsey, Editorial, *Despite Losses, Property-rights Fight is Far From Over*, SEATTLE TIMES, Nov. 15, 2006, at B6 (noting that the chamber of commerce and realtor groups opposed the measure, although most funding came from environmental groups); Volkert, *supra* note 438 (noting that Idaho Association of Realtors opposed the proposition). These broad coalitions may have resulted from the measures' combination of eminent domain reform (which business organizations and developers who can profit from private-to-private condemnations, opposed) and regulatory takings reform (which environmentalists opposed).

as spokespeople.⁴⁴¹ The coalition also managed to successfully depict the initiative's proponents as wealthy out-of-state opportunists, funded by a wealthy New Yorker for "greedy purposes."⁴⁴² The initiative's proponents, led by "This House Is My Home,"⁴⁴³ on the other hand, never really got a campaign going.⁴⁴⁴

In California and Washington, where the outcome was much closer,⁴⁴⁵ observers attributed the defeat of the ballot measures to the opponents' ability to raise more money, build effective coalitions and advertise effectively, as well as to voter wariness about the measures' potential consequences. In both California and Washington, the opponents of the initiatives raised significantly more money than the proponents and vastly outspent the proponents in advertising.⁴⁴⁶ In addition to money and an effective advertising campaign, observers attributed defeat of the measure in California, as in Idaho, to the breadth of the coalition against the measure⁴⁴⁷ as well as the governor's opposition.⁴⁴⁸ Observers attributed the defeat of Initiative 933 in Washington to an effective advertising

441. Ring, *supra* note 440, at 10.

442. Ramsey, *supra* note 440, at B6.

443. Office of the Idaho Secretary of State, Idaho Voters' Pamphlet, November 7, 2006, Argument in Favor, available at <http://www.idsos.state.id.us/elect/inits/06prp2yes.html> (last visited Nov. 9, 2007). Interestingly, the link to "This House Is My Home" from the online voters' pamphlet leads directly to the website of Howard Rich's national libertarian group, Americans For Limited Government, <http://getliberty.org/>. *Id.*

444. See Ramsey, *supra* note 440, at B6 (noting lack of cohesive campaign to promote measure and lack of politically well-known sponsor).

445. See California Proposition 90, *supra* note 415. In California, where Proposition 90 lost by a close margin of 52.5 percent to 47.5 percent, new property rights measures closely resembling the defeated measure have already been proposed for the 2008 ballot. See Harrison Sheppard, *Taxpayer Advocates Launch New Measure*, CONTRA COSTA TIMES, Nov. 25, 2006, at F4 (discussing Prop. 90-like property rights measure proposed for 2008 ballot); Paul Shigley, *Eminent Domain Reform on Horizon: Local Government, Environmentalists Seek to Frame Issue in New Way*, CA. PLANNING & DEV. REP., Jan. 2007, at 1 (same); *Property Rights Back on Radar*, APPEAL-DEMOCRAT (Marysville, CA), Mar. 24, 2007 (discussing various groups' strategies for 2008 property rights ballot initiative).

446. See William Fulton, *Despite Defeat of Prop 90, More Voting On Land Use Restrictions Is Likely* (CALIFORNIA PLANNING & DEVELOPMENT REPORT), Dec. 2006, at 1 (reporting that in California, proponents spent \$4 million and opponents spent \$11 million and that most of the opponents' money was spent on last-minute add campaigns and attributing defeat of the measure to those largely unanswered adds); Eric Pryne, *Your Guide to Initiative 933*, SEATTLE TIMES, Oct. 16, 2006, at A8 (reporting that in Washington, the opponents raised three times as much money as the proponents of Initiative 933, and that the proponents spent most of their money on the collection of signatures necessary to get the initiative on the ballot, while the opponents spent most of their money on advertising); Ramsey, *supra* note 440, at B6 (reporting that in both Washington and California opponents of the ballot measures outspent the proponents "10-to-1 on ads").

447. Fulton, *supra* note 446, at 1 (observing that the coalition included the Chamber of Commerce, Farm Bureau and California Taxpayers Association as well as environmentalists).

448. Shigley, *supra* note 445, at 1 (noting that Gov. Schwarzenegger opposed the measure).

campaign by the opposition⁴⁴⁹ and to discontent with Measure 37 from neighboring Oregonian voters.⁴⁵⁰

VI. THE 2007 AMENDMENTS AND THE PASSAGE OF MEASURE 49

Since its passage, Measure 37 has produced thousands of claims for compensation, hundreds of lawsuits,⁴⁵¹ and ceaseless controversy. As of April 2007, Oregonians had filed approximately 7,560 Measure 37 claims, covering over 750,000 acres and seeking over \$10.4 billion in compensation.⁴⁵² Over 60 percent of these claims were for farm or forest land, and about 33 percent sought subdivision of the land into four or more home sites.⁴⁵³ Nearly half of all Measure 37 claims were filed dur-

449. See Sarah Mirk, *Defeating I-933*, THE STRANGER, August 8, 2006, at 12 (discussing how opponents of Initiative 933 tried “not to make the same cerebral mistake” as Measure 37’s opponents and instead focused on “easy-to-understand, practical reasons for land regulation,” focusing on the outcome of the measure, including more traffic and gravel mines in the neighborhood).

450. See Dolesh & Vaira, *supra* note 405, at 1 (citing discontent among Oregon voters as a possible influence on Washington voters).

451. The press has reported that there are between 135 and 200 pending Measure 37-related cases in Oregon courts. See Laura Oppenheimer, *Bipartisan Fix Emerges to Smooth Measure 37*, OREGONIAN, Mar. 30, 2007, at C1 (reporting the filing of “hundreds of lawsuits”); *Legislature Must Address Measure 37*, CAPITAL PRESS (Salem, Or.), Mar. 16, 2007, available at http://oregonpublicinvestment.com/pdfs-media/CapitalPress_3-16-07_002.pdf (reporting that currently 135 Measure 37-related cases have been filed in Oregon courts); Randi Bjornstad, *Measure 37 Revisions Clear House*, REGISTER-GUARD (Eugene, Or.), May 5, 2007, at A11 (reporting that Measure 37 “has spawned upward of 200 lawsuits”). The Oregon Department of Justice website lists over 240 Measure 37-related lawsuits in which the state is a party. Oregon Department of Justice, Pending Measure 37 Litigation list, www.doj.state.or.us/hot_topics/measure37litigation.shtml.

452. See SHEILA A. MARTIN ET AL., WHAT IS DRIVING MEASURE 37 CLAIMS IN OREGON?, (INSTITUTE OF PORTLAND METROPOLITAN STUDIES, PORTLAND STATE UNIVERSITY) (2007), http://www.pdx.edu/media/i/m/ims_M37April07UAAppt.pdf (presenting statistics from a Portland State University study of Measure 37 claims in power-point); Oregon Department of Land Conservation and Development, DLCD Measure 37, Summaries of Claims Filed in the State, www.oregon.gov/lcd/measure37/summaries_of_claims.shtml#summaries_of_claims_filed_in_the_state (last visited Nov. 9, 2007) [hereinafter Summaries] (giving statistics, stating that DLCD had received 6,749 Measure 37 claims as of May 25, 2007 requesting over \$19 billion in compensation); *Deadline for Processing M37 Claims Extended*, PORTLAND BUS. J., May 10, 2007 [hereinafter *Deadline*] (giving statistics, stating without attribution, that claims are for \$17 billion). Measure 37 created a two year deadline for claims based on land use laws enacted prior to the measure’s effective date, December 4, 2004. OR. REV. STAT. § 197.352(5) (2005).

453. See Martin et al., *supra* note 452 (presenting statistics; percentages refer to both number of claims and acreage); Bruce Pokarney, *Measure 37 & Agriculture: ODA Maps Impacts*, OREGON INSIDER, Feb. 2007, at 14 (discussing statistics of Measure 37 claims for agricultural land, stating that in the Willamette Valley, “51.1 percent of all Measure 37 acres currently in development claims (132,346 acres) involve land zoned for agriculture,” which represents “[a]bout 8.8 percent of the valley’s agricultural-zoned, privately owned land”); Eric Mortenson, *Uproar in Yamhill County*, OREGONIAN, May 31, 2007, at 10 (describing the process by which Yamhill County, one of the top five agricultural production counties in Oregon and a county on the boundary of urban development, processed Measure 37 claims; noting that the county commission approved claims by owners who owned land prior to the enactment of land use law “in a rubber stamp fashion,” had approved 443 claims, affecting approximately 33,000 acres, or 8% of the county’s land mass, and denied only 33 claims, but also reporting that, while many claims had been approved, very few actual houses had been built on Measure 37 land); see also SHEILA A. MARTIN & KATIE SHRIVER, DOCUMENTING THE IMPACT OF MEASURE 37: SELECTED CASE STUDIES (INSTITUTE OF PORTLAND METROPOLITAN STUDIES, PORTLAND STATE UNIVERSITY) (2006), available at http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf (providing a detailed description of ten individual Measure 37 claims and an analysis of their impacts on the residential neighborhoods in

ing the month preceding December 4, 2006, the measure's deadline for filing claims based on land use laws passed prior to the measure's effective date.⁴⁵⁴ These last-minute claims included several large claims by timber companies.⁴⁵⁵ Governments that have processed this deluge of Measure 37 claims have nearly universally waived offending land use regulations rather than pay compensation to the claimants.⁴⁵⁶

Anecdotal evidence⁴⁵⁷ and two 2007 polls indicated that a majority of Oregon voters favored amending or revising Measure 37⁴⁵⁸ and pres-

which the claims were made, on farm and forest lands, and on state and local implementation of land use policy).

454. See Summaries, *supra* note 452 (stating that 3,570 claims were received between November 13 and December 4, 2006); MARTIN ET AL., *supra* note 453 (showing that PSU survey showed approximately 2000 claims were filed in the last month); *Deadline*, *supra* note 452 (stating that 3500 claims were filed in the final month).

455. Laura Oppenheimer & Richard Cockle, *Measure 37 Claims Beat Deadline*, OREGONIAN, Dec. 2, 2006, at E1 (reporting that Plumb Creek Timber Co. made more than 100 claims covering 32,000 acres and demanding \$94.8 million in compensation; discussing other timber company claims). See generally Laura Oppenheimer, *Buy a Slice of Oregon, Complete with Forest View*, OREGONIAN, Dec. 26, 2006 (discussing timber claims); Laura Oppenheimer, *For Sale Signs Sprouting Where Timber Once Stood*, OREGONIAN, Dec. 26, 2006 (same); Laura Oppenheimer, *Profit, Ideology Mix For Some Measure 37 Donors*, OREGONIAN, Apr. 23, 2007 (noting overlap between Measure 37 campaign donors and Measure 37 claimants and citing as an example Portland-based Stimson Lumber Company, which donated \$30,000 to the Measure 37 campaign and now had Measure 37 claims on 52,000 acres of its land); Laura Oppenheimer, *Forests Stir Land-Use Stew*, OREGONIAN, Jan. 26, 2007, at B1 (reporting that more than half of Stimson's claims ask the government to waive a rule requiring landowners to earn a certain forestry income to build a house and that most remaining claims would revert to lots of 20 or 40 acres, rather than keeping land in larger parcels); Editorial, *Revisit Measure 37 (Primary Beneficiaries Aren't "Mom and Pop")*, REGISTER-GUARD (Eugene, Or), Dec. 6, 2006, at A12 (reporting on large Measure 37 claims filed by: Plum Creek Timber Co. (22,000 acres in Lincoln County and 10,000 acres in Coos County); Lone Rock Timberland Co. (proposal to develop 730 acres of forested land near Camp Creek in Lane County); Wildish Land Co. (proposal to develop 1,200 acres it owns along the Willamette River near Mount Pisgah if the county does not agree to purchase it as park land for \$26 million); and Stimson Lumber).

456. See, e.g., Mortenson, *supra* note 453, at 10 (noting that Yamhill County invariably waives the land use law that is the subject of a successful Measure 37 claim rather than pay compensation); Matthew Preusch, *Prineville Offers Measure 37 Pay*, OREGONIAN, Oct. 26, 2006, at A1 (reporting that of the 1500 claims processed as of the time of the article, all governments had waived the offending land use law rather than pay compensation except the town of Prineville, which offered to pay a landowner rather than waive the land use rule, an offer which the landowner rejected).

457. See, e.g., SIGHTLINE INSTITUTE, TWO YEARS OF MEASURE 37: OREGON'S PROPERTY WRONGS (2007), available at http://www.sightline.org/research/sprawl/res_pubs/property-fairness/measure-37-report/two-years-m37-report (discussing individual landowners' discontent with Measure 37 and giving anecdotes of Measure 37 claims for mining in the Newburg Crater national monument and subdivisions on farmland); MARTIN & SHRIVER, *supra* note 453, at 3 (presenting case studies of several Measure 37 claims).

458. One poll showed that 20% of Oregon voters thought the measure should be repealed and 49% thought the measure was flawed and should be fixed as soon as possible, while only 19% approved of Measure 37 as written. Memorandum from David Metz, Fairbank, Maslin, Maullin & Associates, to Opportunity PAC II, Regarding Summary of Key Findings from Oregon Statewide Voter Survey (Mar. 16, 2007), available at http://www.friends.org/issues/M37/documents/040307_OregonStatewideVoterSurvey.pdf (summarizing results of a telephone poll of 600 Oregon voters). The poll results showed that large majority of voters supported strict requirements for landowners to document the lost value of their property, allowing property owners to build up to three houses on their land, and continuing to limit commercial development and subdivisions of farm and forest land. Results of an earlier poll showed 61% of Oregon voters in favor of either repealing or fixing Measure 37. See Press Release, 1000 Friends of Oregon, Oregonians Change Attitudes on Measure 37 (Feb. 8, 2007), available at <http://www.sightline.org/research/sprawl/>

sured the legislature to consider amendments to the measure.⁴⁵⁹ In response, the Oregon legislature made Measure 37 amendments a priority during the 2007 legislative session.⁴⁶⁰ As a first step, the legislature adopted House Bill 3546,⁴⁶¹ which the governor signed into law on May 10, 2007.⁴⁶² The bill offered governments an extension for adjudicating pending Measure 37 claims: For any claim filed after November 1, 2007, governments have 540 days from the filing date to adjudicate the claims, rather than the 180 days allowed under the original measure.⁴⁶³

The legislature also enacted House Bill 3540,⁴⁶⁴ which referred to the state's voters—through Ballot Measure 49—a twenty-one page comprehensive revision of Measure 37.⁴⁶⁵ Adopted by the voters on Novem-

res_pubs/property-fairness/m37-report-press-release (summarizing results of a telephone poll of 500 Oregon voters); Randi Bjornstad, *Poll Shows Voters Want Land Use Law Changed*, REGISTER-GUARD (Eugene, Or.), Feb. 9, 2007, at D1 (discussing January poll).

Oregonians In Action, however, sites polls showing that voters remain in favor of Measure 37 as it is written. See Oregonians In Action, Ballot Measure 37, Question & Answers, Question No. 32, www.measure37.com/measure%2037/faq.htm (last visited Nov. 9, 2007) (citing competing polls).

459. Laura Oppenheimer, *Hundreds Turn Out To Give Their 2 Cents on Measure 37*, OREGONIAN, Apr. 18, 2007, at D4 (reporting large turnout for legislative hearings on Measure 37); Laura Oppenheimer, *Public Demands Land-Use Clarity*, OREGONIAN, Feb. 23, 2007, at A1 (reporting that "Oregonians are so upset about state land-use laws that they've been flooding the Capitol this month to deliver the kind of angry, pleading and tearful speeches you'd expect on abortion and same-sex marriage.")

460. See, e.g., Michelle Cole, *For Many, 2007 Legislature is "Golden Chance,"* OREGONIAN, Jan. 7, 2007, at A10 (discussing legislature's realization that it must address Measure 37 during the 2007 session).

461. H.B. 3546, 74th Leg., Reg. Sess. § 2(2)(a) (Or. 2007), available at <http://www.leg.state.or.us/07reg/measpdf/hb3500.dir/hb3546.b.pdf> (last visited Nov. 9, 2007).

462. See *Deadline*, supra 452 (noting that the bill was signed into law just days before the deadline for adjudicating the large number of claims filed during the last month before the December 4, 2006 deadline).

463. H.B. 3546 (providing that "just compensation under [Measure 37] is due the owner of the property from the public entity only if the land use regulation continues to be enforced against the property 540 days after the Measure 37 claim is made to the public entity"). Measure 37 required governments to compensate property owners for land use restrictions that continued to apply to their property 180 days after they filed their Measure 37 claim. OR. REV. STAT. § 197.352(4) (2005).

H.B. 3546 also provided that if the claimant died before her claim was adjudicated by the government, anyone who acquired the subject property "by devise or by operation of law" could prosecute the Measure 37 claim. Or. H.B. 3546.

464. H.B. 3540, 74th Leg., Reg. Sess. (Or. 2007), available at <http://www.leg.state.or.us/07reg/measpdf/hb3500.dir/hb3540.b.pdf> (last visited Nov. 9, 2007). The Oregon House of Representatives passed an earlier version of the bill by a party-line vote of 31 to 24 on May 4, 2007. Laura Oppenheimer, *Measure 37 Election: Emotions Will Flow in Battle Over Rewrite*, OREGONIAN, May 5, 2007, at B01 (noting that "a fall ballot referral cleared its last major obstacle—passing the Oregon House of Representatives in a 31-24 party-line vote"). The Senate revised and passed the bill by a vote of 19-11 along party lines on June 5, 2007, whereupon the House re-passed the bill, as amended, on June 6, 2007 by a party-line vote of 31-26. The bill was filed with the Secretary of State on June 15, 2007. See Legislative History of House Bill 3540, available at <http://www.leg.state.or.us/searchmeas.html> (select "house bill" option and enter "3540" in the number field) (last visited Nov. 9, 2007).

465. H.B. 3540, § 25 ("This 2007 Act shall be submitted to the people for their approval or rejection at a special election held throughout this state . . ."); see also Edward Walsh, *Voters Will Decide Hot Issues*, OREGONIAN, July 2, 2007, at B1 (discussing referral of Oregon House Bill 3540 to voters in a special election on November 6, 2007).

On November 6, 2007, by a vote of 61-39 percent (roughly the same margin by which the voters approved Measure 37 three years earlier), the Oregon Electorate ratified Measure 49. Eric Morten-

ber 6, 2007, Measure 49 will curtail some of the most extreme results of Measure 37.⁴⁶⁶ For example, it limited Measure 37 claims to situations in which land use laws “restrict the *residential* use of private real property or a farming or forest practice and that reduce the fair market value of the property”—no Measure 37 claim may now accrue for land use laws limiting commercial or industrial uses.⁴⁶⁷ Measure 49 also eliminated Measure 37’s inheritance right—present owners of property have claims only for land use regulations enacted during their tenure as owners, not that of their ancestors.⁴⁶⁸

Measure 49 established January 1, 2007 as a marker—providing one process of adjudicating claims arising from land use restrictions enacted prior to that date and another procedure for claims based on restrictions enacted after that date.⁴⁶⁹ All claims based on land use restrictions enacted prior to January 1, 2007, must have been filed by the date on which the 2007 legislative sessions ended.⁴⁷⁰ For these claims, which

son, *Voters Keep Cigarette Tax As Is But Roll Back Property Rights*, THE OREGONIAN, Nov. 7, 2007.

466. Measure 49 passed with 718,023 votes for (61.3%) and 437,351 votes against (38.7%), roughly the same margin by which the voters approved Measure 37 three years earlier. See Office of the Oregon Secretary of State, Elections Div., Official Results for 2007 November Special Election, available at <http://www.sos.state.or.us/elections/nov62007/abstract/results.doc>.

The version of Oregon House Bill 3540 that originally passed the House would have required a certain quantum of devaluation to trigger compensation. H.B. 3540, § 12(2). Unlike Measure 37, which required government to compensate landowners for *any* reduction in value of their land due to land use regulation, the House version of the Oregon House Bill 3540 would have prospectively required governments to compensate landowners only if a single land use regulation diminished the fair market value of their property by 10 percent, or if multiple land use laws diminished the value of land by 25 percent. *Id.* § 12(2)(b)-(c) (the bill, however, would have required that a farming or forest practice regulation that results in *any* reduction of value gives rise to a compensation claim. *Id.* §§ 12(2)(a). The Senate deleted the triggering provision, and retained Measure 37’s provision that any loss in value whatsoever—as calculated according to the provisions of Oregon House Bill 3450—triggers compensation. *Id.* § 12(2).

467. *Id.* § 4(1) (emphasis added) (“If a public entity enacts one or more land use regulations that restrict the *residential* use of private real property or a farming or forest practice and that reduces the fair market value of the property . . . then the owner of the property shall be entitled to just compensation from the public entity that enacted the land use regulation”); *Id.* § 12(1)(b) (applying to claims filed after the 2007 legislative session; providing that a landowner may apply for compensation only if “the person’s desired use of property is residential use or a farming or forest practice”).

468. *Id.* § 4(3) (providing that Measure 37’s compensation requirement does not apply to “land use regulations that were enacted prior to the claimant’s acquisition date”); *Id.* § 21(1) (providing that “a claimant’s acquisition date is the date the claimant became the owner of the property as shown in the deed records of the county in which the property is located”); *Id.* § 21(2) (providing that “[i]f the claimant is the surviving spouse of a person who was the sole owner of the property in fee title at all times during the marriage, the claimant’s acquisition date is the date the claimant was married to the deceased spouse or the date the spouse acquired the property, whichever is *later*”) (emphasis added); *Id.* § 21(3) (providing that “[i]f a claimant conveyed the property to another person and reacquired the property, whether by foreclosure or otherwise, the claimant’s acquisition date is the date the claimant *reacquired* ownership of the property”) (emphasis added).

469. *Id.* § 2(13) (defining just compensation under the bill as one remedy for claims based on pre-January 1, 2007 laws and as another for claims based on post-January 1, 2007 laws).

470. *Id.* § 5 (providing that claimants who file claims on or before the adjournment date of the 2007 legislative session are entitled to compensation pursuant to sections 6, 7 or 9 of the bill). This provision effectively extended the original December 2006 filing deadline for claims based on land

include previously approved Measure 37 claims,⁴⁷¹ Measure 49 restricted the number of dwellings successful claimants may build. Claimants owning high value farm- and forestland or groundwater-restricted land are limited to three dwellings,⁴⁷² while claimants owning land within urban growth boundaries and on non-high-value land outside urban growth boundaries may obtain waivers to build up to ten dwellings.⁴⁷³ To obtain waivers for up to three dwellings, claimants need not show that a land use restriction reduced the value of their land, only that land use regulation prohibits establishing a lot, parcel, or dwelling where none did so at the time they acquired their property.⁴⁷⁴ To obtain waivers for up to ten dwellings, claimants must make an additional showing of a reduction in property value due to land use regulation using a new formula in House Bill 3540.⁴⁷⁵ Measure 49 capped at twenty the number of home sites any owner—whether filing a claim based on a pre- or post- January 1, 2007 land use law—may obtain through Measure 37 waivers, regardless of the number of properties she owns.⁴⁷⁶

use laws enacted prior to Measure 37 to June 28, 2007—the date on which the 2007 legislature adjourned. See *supra* note 462 (describing effect of the original December deadline).

471. Landowners that have already obtained waivers pursuant to Measure 37 and have acted upon that waiver such that they have a “common law vested right on the effective date of [Oregon House Bill 3540] to complete and continue the use described in the waiver” may continue to take advantage of this waiver, according to the terms of that waiver. H.B. 3540, § 5(3). Other landowners, even those that have obtained waivers, must comply with the limitations Measure 49 places on development. *Id.* §§ 6(2), 7(2), 9(2) (providing that the landowner is entitled to the *lesser* of the dwellings approved under her Measure 37 waiver or the amount allowed under Oregon House Bill 3540). Oregon House Bill 3540 requires DLCD to send to Measure 37 claimants a notice describing how the bill affects their claims. *Id.* § 8.

472. *Id.* §§ 6(1)-(2) (limiting claimants to three home site approvals). The bill further prescribes lot size restrictions for development pursuant to a waiver. *Id.* § 11(3).

473. *Id.* §§ 9(1)-(2), (5)(k), (6) (limiting claimants within an urban growth boundary to ten homesite approvals upon a showing of lost value); *Id.* §§ 7(1), (2), (5)(g) (providing that claimants who own land that is not high value farm land, high value forest land, or groundwater restricted, and who show that the value of three homesites would not recoup the lost value caused by the offending land use regulation, could obtain a waiver for up to ten dwellings). Claimants must choose at the time they file their claim whether to proceed with a claim for three dwellings, or to pursue a claim for up to ten dwellings, with the required showing that three provided inadequate compensation. *Id.* § 8(3) (providing that a claimants must choose to proceed under § 6 (three home-sites) or § 7 (up to ten home-sites)).

474. *Id.* § 6(6) (setting forth qualifications for three-homesite waivers; requiring showing of “one or more land use regulations prohibit establishing the lot, parcel or dwelling” and “on the claimant’s acquisition date, the claimant lawfully was permitted to establish at least the number of lots, parcels or dwellings on the property that are authorized under this section [i.e. three]”).

475. *Id.* § 7(5)(g) (for non-high-value land outside an urban growth boundary, providing that, in addition to the showings required to obtain a three-homesite waiver, claimants must show that “the enactment of one or more land use regulations . . . that are the basis for the claim caused a reduction in the fair market value of the property that is equal to or greater than the fair market value of the home site approvals that may be established under [the 10-homesite provision] . . .”); *Id.* at § 9(5)(g) (saying same as § 7(5)(g), but for land within urban growth boundary); *Id.* § 7(6) (providing formula for measuring lost value for non-high-value land outside an urban growth boundary—which is measured as the “decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest”); *Id.* § 9(6) (same, for land within urban growth boundary).

476. *Id.* § 11(5).

For prospective claims based on land use regulations enacted after January 1, 2007, Measure 49 is less restrictive. While claims still accrue only when land use laws restrict residential use or farming or forestry uses of land, there is no express limit—other than the overall twenty-homesite cap⁴⁷⁷—to the number of dwellings on a successful claimant’s property.⁴⁷⁸ Instead, claimants are entitled to compensation for the reduction in fair market value of the property, as measured according to the formula established by the bill,⁴⁷⁹ or a waiver to use the property “without application of the land use regulation to the extent necessary to offset the reduction in the fair market value of the property.”⁴⁸⁰ Claimants must file their claims within five years of the offending regulation’s enactment.⁴⁸¹

Other significant changes Measure 49 made to Measure 37 include: (1) allowing waivers to be transferred upon the sale of the property,⁴⁸² (2)

477. *Id.*

478. *Id.* §§ 4(1), 12(1)(b).

479. *Id.* § 12(2) (setting forth methodology for determining valuation). The formula for prospective claims is the same as that set out in sections 7(6) and 9(6) for the ten-homesite retrospective claims: a claimant must show a the “decrease . . . in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment.” *Id.* At least one commentator has noted that HB 3540’s valuation methodology might avoid some of the windfall gains to successful claimants created by Measure 37. See JOHN D. ECHEVERRIA, ANALYSIS OF OREGON HOUSE BILL 3540/MEASURE 49 (GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE) 7-9 (2007) (on file with authors). Professor Echeverria argued that, “by comparing the value of property prior to the adoption of a regulation with the value of property after the adoption of the regulation, the [House Bill 3540] calculation should capture, at least to some degree, both the positive and negative effects of a change in regulatory policy.” *Id.* at 7. Measure 37’s method of determining value lost as a result of land use restrictions—which simply compared the value of land with the land use restriction and the value of land without such restriction—was susceptible to providing windfall gains to landowners by compensating them for the value created by freeing their land from regulation while continuing to regulate their neighbors’ land, which is not the same as value lost as a result of regulation. *Id.* at 6; see also *supra* note 162 (discussing criticisms of Measure 37 valuation methodology). Professor Echeverria criticized HB 3540’s valuation method on the grounds that it: (i) is—like Measure 37—based on the “mistaken premise that no regulation can legitimately have an adverse effect on value, no matter how modest”; (ii) fails to subtract out market effects on value other than those caused by land use regulation; (iii) requires claimants to establish the reduction in value of their property caused by the enactment, not the application, of the land use restriction, which is difficult to measure and may lead to unreliable results; and (iv) allows for different market appraisal techniques, “notoriously subject to manipulation,” in fixing lost value. *Id.* at 8. Ultimately, Professor Echeverria concluded that “all of these considerations combine to make it difficult to predict how HB 3540 would affect potential future regulatory programs.” *Id.* at 9.

480. H.B. 3540, §§ 12(4)(a), (b). This differs from Measure 37’s provision, which allowed government to “modify, remove, or not to [sic] apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.” Measure 37, *supra* note 1, at § 8. House Bill 3540 provides that government may issue a waiver only “to the extent necessary to offset the reduction in fair market value of the property.” H.B. 3540, §§ 12(4)(b), (5)(b). As one prominent commentator has noted, HB 3540’s provision may allow government to limit the scope of waivers they grant future claimants. See ECHEVERRIA, *supra* note 479, at 6, 10.

481. H.B. 3540, § 13(4).

482. *Id.* § 11(6). The transferee must exercise her development right within ten years of the transfer. *Id.*

establishing specific criteria for determining fair market value,⁴⁸³ (3) clarifying what constitutes a “land use regulation,”⁴⁸⁴ (4) specifying that the governing body that *enacted* the land use regulation was responsible for compensation,⁴⁸⁵ (5) creating an express cause of action for neighboring landowners adversely affected by Measure 37 decisions,⁴⁸⁶ and (6) requiring the governor to appoint an ombudsman to “analyze problems of land use planning, real property law and real property valuation and facilitate resolution of complex disputes.”⁴⁸⁷ Measure 49 also prospectively narrowed several of the exceptions to Measure 37: The health and safety exception will not apply to future regulation of agriculture and forest practices unless the “primary purpose” of the regulation was to protect human health and safety,⁴⁸⁸ and the exception of regulations designed to comply with federal law will not apply to any future regulation of agriculture or forest practices unless the government enacting the regulation has “no discretion” to decline to comply.⁴⁸⁹ However, Measure 49 left unchanged Measure 37’s provision excepting from compensation those land use regulations prohibiting pornographic activities or restricting activities “commonly and historically recognized as public nuisances under common law.”⁴⁹⁰

On balance, Measure 37 was, at most, an imperfect compromise.⁴⁹¹ On the one hand, it limited Measure 37’s worst excesses by (1) restricting compensation (and waivers) to landowners affected by land use laws restricting residences, thereby eliminating the use of Measure 37 for in-

483. *Id.* §§ 7(6), (7), 12(2) (setting forth a valuation system, measuring loss of value by comparing the value of the land one year prior to the enactment of the land use law with the value of the land one year after its enactment).

484. *Id.* § 2(14) (listing specific provisions in the land use code, local comprehensive plans, forestry and agricultural regulations, LCDC rules and goals).

485. *Id.* § 4(6) (amending Measure 37 to provide “[t]he public entity that enacted the land use regulation that gives rise to the claim . . . shall provide just compensation”).

486. *Id.* § 16 (providing that not only Measure 37 claimants, but also adversely affected persons “who timely submitted written evidence, arguments or comments to a public entity concerning the [Measure 37] determination” with a cause of action to seek judicial review of the determination).

487. *Id.* § 17.

488. *Id.* § 4(4)(b) (providing that public health and safety exception “does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the primary purpose of the regulation is the protection of human health and safety”).

489. *Id.* § 4(4)(c) (providing that the exception for land use regulations required to comply with federal law “does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the public entity enacting the regulation has no discretion under federal law to decline to enact the regulation”).

490. *Id.* §§ 4(3)(a), (c), (d).

491. As Professor Echeverria has pointed out, the compromise satisfies two of the most powerful interest groups in the Measure 37 debate—1000 Friends of Oregon, which advocates for protection of rural land and headed up opposition to original Measure 37, and the timber industry, the group that provided most of the financial backing for the pro-Measure 37 campaign in an effort to curtail the state from further regulating forest practices. See ECHEVERRIA, *supra* note 479, at 8-9. Measure 49 responded to the former by restoring most, but not all, of the pre-Measure 37 restrictions on development of the state’s agricultural and forest land base. *Id.* And Measure 49 accommodated the latter by making future restrictions of forest practices (along with restrictions of residential development and agriculture) compensable, thereby granting the timber industry immunity from future regulation of forest practices. *Id.*

dustrial or commercial development waivers, (2) eliminating the inheritance right, and (3) curtailing the number of housing sites to which Measure 37 claimants are entitled.⁴⁹² As one observer put it, Measure 37 went “a long way toward restoring restrictions on development of Oregon’s farm and forest lands that were in place for 30-plus years prior to the adoption of Measure 37.”⁴⁹³ On the other hand, Measure 49 retained, at least to a large extent, the promise at the heart of Measure 37—entitling landowners to compensation for loss of value or a regulatory waiver when a government enacts a regulation restricting residential development, agriculture, or forestry practices—thereby curtailing governmental ability to manage future growth.⁴⁹⁴

CONCLUSION

Even though Oregon voters decided to amend Measure 37 by enacting Measure 49, Measure 37 will continue to have profound effects on the Oregon landscape and on the nature of property rights in the state. Measure 37 reflected an assumption by a majority of the Oregon electorate that the state’s land use regulations had unfairly intruded on landowner development rights, at least on those landowners who acquired their land before the regulations. The political campaign which succeeded in passing Measure 37 emphasized the lost development rights of elderly widows and small landowners,⁴⁹⁵ but the language of the measure was not limited to small developments,⁴⁹⁶ and consequently many large-scale claims were filed.⁴⁹⁷ Under Measure 49 those large-scale developments will no longer be possible, since Measure 37 is now restricted to relatively small developments.⁴⁹⁸

Although Measure 37’s proponents heralded it as a compensation measure, in application the measure has produced no compensation payments. Instead, fiscally-strapped Oregon governments have uniformly waived regulatory requirements rather than pay compensation.⁴⁹⁹ Thus, there have been neither challenges over the amount of compensation due

492. H.B. 3540, § 4(1) (residential and farm or forest practices); § 4(3) (eliminating inheritance right); §§ 11(5), 7(1), (2), (5)(g), 9(1)-(2) (restricting number of dwellings for claimants with claims based on pre-January 1, 2007 claims).

493. ECHEVERRIA, *supra* note 479, at 9.

494. H.B. 3540, §§ 12(4)(a), (b). A government that in 2008 enacted a law increasing minimum lot sizes, for instance, would be required to compensate (or waive the law) all affected landowners who acquired their property prior to the enactment and who could show diminution in value. *Id.* Professor Echeverria has predicted that “the most important effect of revised Measure 37 is probably that it would discourage state and local officials from adopting new land use regulations affecting residential or farm or agricultural [or forestry] practices” because “[i]n simple terms, government officials would see no advantage in investigating resources and political capital in developing and adopting new regulations if they would then be forced to issue numerous waivers.” ECHEVERRIA, *supra* note 479, at 11.

495. See *supra* notes 145-47 and accompanying text.

496. See *supra* notes 150-61 and accompanying text.

497. See *supra* notes 451-55 and accompanying text.

498. See *supra* notes 464-94 and accompanying text.

499. See *supra* note 456 and accompanying text.

nor claims that the effect of regulation was to add value, not reduce it. In effect, Measure 37 has operated as a large-scale deregulatory measure, repealing land use regulations for select landowners.

The wisdom of this deregulation initiative is certainly open to question. Measure 37 is a planner's nightmare, as it awards development rights on the basis of duration of ownership, not suitability to location or compatibility with a neighborhood. Moreover, its premise that development rights are fundamental property rights has never been accepted as dominant in Anglo-American law. Development rights have always been cabined by the maxim of *sic utere tuo ut non laedas*⁵⁰⁰—the “do no harm” rule. As Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts memorably phrased it over a century-and-a-half ago:

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth...is derived directly or indirectly from the government, and is held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property...are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to reasonable restraints and regulation established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.⁵⁰¹

One way to explain Measure 37 is that the Oregon electorate redefined the “do no harm” rule so as provide compensation or regulatory waivers to certain landowners whose land acquisition antedated regulation. In so doing, the electorate chose to define “reasonable” land use so as to make duration of ownership determinative rather than adverse effects on neighbors or ecological damage. Whether this choice was a wise one in an increasingly interconnected, carbon-limited world is for other jurisdictions to evaluate. And in fact Oregon voters decided to curb the scope of Measure 37 rights in recognition of their costs on third parties and the environment.⁵⁰²

Another way to explain Measure 37 is that Oregon voters decided, that the fetters the state's land use system placed on certain landowners' development rights were inconsistent with ordinary notions of the moral

500. Or use your property as not to injure that of another's. See JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE ch. 13, n. 1 (1843), available at <http://www.la.utexas.edu/research/poltheory/bentham/pcc/index.html>.

501. Commonwealth v. Alger, 61 Mass. 53, 84-85 (Mass. 1851).

502. See *supra* notes 464-94 and accompanying text.

dimension of property rights.⁵⁰³ This interpretation would also account for Measure 49's reduction in the scope of Measure 37 rights to small developments, rectifying the perceived unfairness of alleged overregulation. To the extent that Measure 37 is explainable on fairness grounds—and not on a deregulatory effort phrased in fairness terms—Measure 49 may seem to be a suitable—albeit imperfect⁵⁰⁴—antidote.

But perhaps the most telling way to understand Measure 37 is that the Oregon electorate was sympathetic to the notion that development rights *were* the equivalent of property rights. And that these development rights existed in the abstract, regardless of the geographic or environmental context of their exercise. However ahistorical, or out of touch with the complexities of the twenty-first century,⁵⁰⁵ or inconsistent with sophisticated definitions of what property rights actually entail,⁵⁰⁶ or in conflict with contemporary concerns over urban sprawl or carbon emissions, this abstract vision of property rights as equivalent to development rights apparently resonated with Oregon (and, apparently, Arizona) voters.

An abstract vision of property prevailed in the late nineteenth and early twentieth centuries, leading to decisions like *Lochner v. New York*,⁵⁰⁷ a result now widely reviled.⁵⁰⁸ Measure 37 (and its ensuing adoption in Arizona⁵⁰⁹) may reflect a revival of interest in viewing development rights as idealized abstractions that are fundamental, regardless of their context. The costs of such abstractionism will eventually become evident to Oregonians, although perhaps not in the short run. But Measure 37's readjustment of property rights will surely serve as a laboratory for other jurisdictions, which also grapple with what a century-and-a-half ago Justice Shaw described as the effort in a “well ordered civil society” to avoid “injurious” uses, including those adversely affecting neighbors and “the rights of the community.”⁵¹⁰ The challenge

503. See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007); see also BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10-15, 97-100 (1977) (noting the power of the “ordinary observer’s” definition of property).

504. See ECHEVERRIA, *supra* note 479, at 10-11 (noting that under an amended Measure 37, state and local governments would still routinely choose to waive regulatory requirements, rather than pay compensation, and that new land use regulations would be chilled).

505. See generally FREYFOGLE, *supra* note 17.

506. See ACKERMAN, *supra* note 503, at 10-15 (distinguishing a “Scientific Policy Maker” from an “Ordinary Observer”).

507. 198 U.S. 45, 52-53 (1905) (striking down a New York statute setting maximum hours for bakers as inconsistent with the freedom of contract guaranteed by the due process clause of the Fourteenth Amendment).

508. See, e.g., LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-5-8-6 (3rd ed. 2000) (discussing the demise of *Lochner*'s vision of substantive due process review of the merits of socio-economic legislation).

509. See *supra* notes 427-33 and accompanying text.

510. *Commonwealth v. Alger*, 61 Mass. 53, 84-85 (Mass. 1851); see also *supra* note 501 and accompanying text.

of the future will be to ascertain whether the radical changes in development rights ushered in by Measure 37 and its copycats are an accurate reflection of the morality of property rights of the twenty-first century.