OREGON LAND-USE REGULATION AND BALLOT MEASURE 37: NEWTON'S THIRD LAW AT WORK

BY

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In 1973, the Oregon Legislature adopted Senate Bill 100, creating Oregon's unique and controversial statewide, centralized land-use system. The impact for Oregon property owners, particularly those in rural areas, was dramatic. In the years following adoption of Senate Bill 100, the state system evolved and additional land-use restrictions were enacted, with little relief for those subjected to the economic and emotional burdens imposed by the state.

Neither the Oregon legislature nor the Oregon judiciary provided relief from the burdens imposed by the new land-use system. In response, since 2000, Oregon voters have adopted two ballot measures requiring state and local governments to compensate property owners when a land-use regulation that lowers a property's value is adopted after an owner purchases the property. The last measure, Ballot Measure 37, was approved in November 2004, and was in operation until October 2005, when it was declared unconstitutional by a Marion County trial judge.

This essay traces the history of Oregon's planning experiment, its evolution, and its impact on rural Oregonians; the failure by the Oregon appellate courts to craft a coherent body of case law interpreting the takings clause of the Oregon Constitution; the campaign and adoption by the Oregon voters of both Measure 7 (2000) and Measure 37 (2004); and the subsequent invalidation by the judiciary of each measure. The essay analyzes the rationale for the invalidation of Measure 37, and predicts the likely outcome of the Measure 37 litigation, which is ongoing.

Finally, the author predicts the future of Oregon's system, and suggests changes that will create a more equitable and stable set of planning laws.

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I. INTRODUCTION

The passage of Ballot Measure 37 by Oregon voters in November 2004 has reignited the national debate over the line between the rights of individual property owners to use their property and the desire of government, sometimes with the support of the public, to regulate property uses through zoning or other means to provide benefits to the public.

For the uninitiated, Measure 37[1] requires state and local governments in Oregon to pay just compensation to a property owner when land-use laws, enacted after the current owner or a "family member" of the current owner first acquired the property, have the effect of limiting uses on that property and lowering the property's fair market value.[2] As an alternative to compensation, the government may choose to modify, remove, or not apply the land-use law to allow the property owner to use the property in the manner in which it could have been used when it was purchased.[3]

In effect, Measure 37 is a grandfather clause, designed to secure to the owners of property in Oregon the benefit of their bargain. The measure is based on the premise that the economic costs of land-use regulations

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1 Ballot Measure 37 (Or. 2004).
2 *Id.* § (1).
3 *Id.* § (8).

designed to benefit the public should be borne by the public as a whole, rather than an individual property owner whose land has been restricted.

No examination of Measure 37 would be complete without a basic understanding of Oregon's unique and controversial land-use system. The inequities created by Oregon's statewide, centralized planning system fueled the campaign in support of the measure and ultimately led to its passage. Although a thorough evaluation of the scope of Oregon's land-use system is beyond the limits of this essay, this essay attempts to provide sufficient background to understand what provided much of the impetus for reform behind the measure.

II. HISTORY OF STATEWIDE PLANNING IN OREGON

A. Senate Bill 10

Oregon's experiment with statewide planning began in the late 1960s. Fueled by a growing awareness of environmental issues, the legislature adopted Senate Bill 10 in 1969.[4] Senate Bill 10 required Oregon's Governor to prescribe and amend comprehensive plans and zoning ordinances for lands within cities and counties that were not subject to an existing locally adopted zoning ordinance and comprehensive plan.[5]

The Governor was further directed to consider nine broad goals in preparing and adopting comprehensive plans and zoning ordinances for unzoned lands subject to the Governor's planning control.[6] Among the goals were the preservation of air and water quality, the conservation of open space and prime farm land, and the development of timely, orderly, and efficient provision of public facilities and services.[7]

Although Senate Bill 10 authorized direct state involvement in what had previously been within the exclusive purview of Oregon cities and counties, local jurisdictions could avoid application of the law by adopting their own comprehensive plans and zoning ordinances. A local comprehensive plan and zoning ordinance was not subject to the goals contained in Senate Bill 10, and thus could be prepared and framed in whatever manner the local government determined would best fit the needs of the local community. As a result, for those desiring statewide planning control of Oregon property, Senate Bill 10 was an ineffective tool to accomplish those ends.

B. Senate Bill 100

By 1973, it had become clear that Senate Bill 10 would not result in direct oversight by state government of the zoning and planning activities of

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4 1969 Or. Laws 578.

5 *Id.*

6 *Id.* at 578–79.

7 *Id.*

Oregon local governments. As a result, the 1973 legislature adopted Senate Bill 100.[8]

Unlike Senate Bill 10, Senate Bill 100 created a state agency, the Department of Land Conservation and Development, and mandated that every local comprehensive plan and zoning ordinance comply with statewide land-use goals established by the department through its Land Conservation and Development Commission (LCDC), a seven member agency of political appointees of the Oregon governor.[9] LCDC was given until January 1, 1975 to create statewide planning goals.[10] In the interim, city and county comprehensive plans were required to comply with the goals established by Senate Bill 10, which previously had applied only to those unzoned lands subject to the planning control of the Oregon governor.[11]

Senate Bill 100 was revolutionary in its scope and alteration of zoning and planning authority, an area traditionally reserved for local authorities.[12] It was also a remarkable display of the delegation of authority from the state legislature to a newly created state agency—authority to create goals affecting all private land in Oregon, and the duty to require that all cities and counties comply with those goals. For all intents and purposes, Senate Bill 100 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.

To some extent, the legislature was aware of the scope and magnitude of the law it was creating, as well as the impact that the law would have on private landowners, many of whom had few, if any, limitations on the use of their property. As part of Senate Bill 100, the legislature established a Joint Legislative Committee on Land Use consisting of four members of the Oregon House of Representatives and three members of the Oregon Senate.[13] Among the tasks assigned to the committee by Senate Bill 100 was a requirement that the committee study and make a recommendation to the legislative assembly on the implementation of a program for compensation by the state to property owners for the value of any loss of use resulting from the imposition of zoning or subdivision laws created by Senate Bill 100.[14] In subsequent years, however, the committee was unable or unwilling to make a recommendation to the full legislative body on a plan for compensation of property owners impacted by land-use regulations. In 1981, the legislative assembly amended Oregon Revised Statutes section 197.135 to delete the requirement for the committee to propose a compensation fund, and the legislature subsequently forgot the issue.[15]

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[8] 1973 Or. Laws 127, *available at* http://www.oregon.gov/LCD/docs/bills/sb100.pdf.

[9] *Id.* at 129.

[10] *Id.* at 137.

[11] *Id.* at 139.

[12] *See* Jerold S. Kayden, *National Land Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 449 (2000) (discussing the control and regulation by local governments over land-use planning).

[13] 1973 Or. Laws 127, 133–34.

[14] *Id.* at 134.

[15] 1981 Or. Laws 976, 987.

C. The Adoption of Statewide Goals

As mandated by Senate Bill 100, LCDC was formed and began its task of developing statewide planning goals. By January 25, 1975, fourteen of LCDC's nineteen land-use goals were adopted and effective.[16] Of particular importance to the controversy surrounding Measure 37 are Goals 3 (agricultural lands) and 4 (forest lands).[17]

Goal 3 contains a broad definition of agricultural land, and mandates that land meeting the definition of agricultural land be "preserved and maintained for farm use."[18] In western Oregon, agricultural land includes land of predominantly class I–IV soils, based on the Soil Capability Classification System of the United States Natural Resource Conservation Service, which classifies soils into eight soil types, with class I soils being suitable for agriculture and class VIII soils unsuitable.[19] In eastern Oregon, agricultural land includes land of predominantly class I–VI soils.[20] In addition to land that automatically qualifies as agricultural land based on predominant soil type, land of other soil types that are suitable for farming are also included as Goal 3 agricultural land, as are lands that are necessary to permit farm practices to be undertaken on adjacent or nearby land.[21] In defining agricultural land under Goal 3, LCDC does not take into account parcel sizes, development on the land or on adjacent or nearby parcels, historic activities—or lack thereof—on the parcel or adjoining parcels, or the capability of the parcel to produce any income—much less a net income—from agricultural activities.

Goal 4 is LCDC's forest land goal.[22] Under Goal 4, forest land in Oregon is defined to include lands that are suitable for commercial forest practices, adjacent or nearby lands which are unsuitable for commercial forest practices but which are needed to permit forest operations or practices in the area, and all other forested lands that maintain soil, air, water, fish, and wildlife resources.[23] Like Goal 3, LCDC did not consider parcel size when determining whether land should be defined as forest land, nor did it take into account activities on the land or adjacent lands or the capability of the parcel to produce harvestable timber. In fact, given the broad definition of forest land contained in Goal 4, it is difficult to imagine any land with trees

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16 OR. DEP'T OF LAND CONSERVATION AND DEV., OREGON'S STATEWIDE PLANNING GOALS AND GUIDELINES, tbl. Oregon's Statewide Planning Goals (1995).

17 While LCDC does not keep statistics on the zoning of properties subject to claims under Measure 37, a cursory review of the Commission's decisions to date demonstrates that the vast majority of land-use regulations creating claims are the result of farm or forest zoning under Goals 3 and 4. A list of final decisions by LCDC on claims filed with the State of Oregon may be found at http://www.lcd.state.or.us.

18 OR. DEP'T OF LAND CONSERVATION AND DEV., *supra* note 16, at 6.

19 *Id.*; *see also* NATURAL RES. CONSERVATION SERV., NATIONAL SOIL SURVEY HANDBOOK § 622.02(e) (2005), *available at* http://soils.usda.gov/technical/handbook/contents/part622.html (outlining soil classifications).

20 OR. DEP'T OF LAND CONSERVATION AND DEV., *supra* note 16, at 6.

21 *Id.*

22 *Id.* at 7.

23 *Id.*

that would not meet the definition of forest land, which includes land within urban areas.

There are currently nineteen statewide goals adopted by LCDC.[24] But for purposes of Measure 37, Goals 3 and 4, and their implementation by LCDC, stand out as creating the greatest number of Measure 37 claims.

D. Implementation of the Goals

LCDC implements the nineteen statewide planning goals through a series of administrative rules found in Chapter 660 of the Oregon Administrative Rules. Goal 3's administrative rules are found in division 33. Goal 4's rules are located in division 6.

For agricultural lands defined by Goal 3, LCDC administrative rules significantly limit uses that property owners can make of their property. A list of allowed uses is set forth by rule.[25] LCDC also distinguishes between "high value farmland" and other types of agricultural land in its rule.[26]

The most controversial of LCDC's agricultural land rules are those pertaining to the siting of single family dwellings and the division of property.[27] LCDC rules recognize five different types of dwellings in agricultural zones: 1) a dwelling customarily provided in conjunction with farm use,[28] 2) a "lot of record" dwelling,[29] 3) a non-farm dwelling,[30] 4) a farm manager's dwelling,[31] and 5) a hardship dwelling.[32]

Although the number of different types of dwellings authorized by LCDC on agricultural land is broad, each dwelling type contains significant restrictions, making it difficult if not impossible to qualify for the dwelling. For example, a dwelling customarily provided in conjunction with farm use may be sited on "high value farmland" only if the applicant for the dwelling generates farm income of at least $80,000 per year on the parcel for two consecutive years, or three of the last five years.[33] On other agricultural land, the applicant for the dwelling must demonstrate the production of $40,000 of gross farm income per year for the same time period or own a parcel of at least 160 acres.[34]

An applicant for a "lot of record" dwelling must demonstrate that he or she has owned the property continuously since January 1, 1985, and that his or her parcel is not "high value farmland," or if it is "high value farmland," that it is a parcel smaller than twenty-one acres that is bordered on at least sixty-seven percent of its perimeter by tracts smaller than twenty-one acres in size, a flaglot bordered on at least twenty-five percent of its perimeter by

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24 *Id.* at intro.
25 OR. ADMIN. R. 660-033-0120, -0130 (2005).
26 *Id.* 660-033-0120. The definition of "high value farmland" is found at *id.* 660-033-0135.
27 *Id.* 660-033-0120, 660-033-0130, 660-033-0135.
28 *Id.* 660-033-0135(5), (7).
29 *Id.* 660-033-0130(3).
30 *Id.* 660-033-0130(4).
31 *Id.* 660-033-0130(9).
32 *Id.* 660-033-0130(10).
33 *Id.* 660-033-0135(7).
34 *Id.* 660-033-0135(1), (5).

tracts smaller than twenty-one acres with at least four dwellings that were in existence as of January 1, 1993, within a quarter mile from the center of the parcel on the same side of the public road as the subject tract, or if the parcel is not a flaglot, that it is bordered on at least twenty-five percent of its perimeter by tracts smaller than twenty-one acres and at least four dwellings built before January 1, 1993 existed within a quarter mile from the center of the parcel.[35]

A non-farm dwelling can only be sited on parcels composed of class IV–VII soils, and then only if the dwelling will not "materially alter the stability of the overall land-use pattern of the area," and will not "force a significant change in or significantly increase the cost of accepted farm or forest practices on nearby lands devoted to farm forest use."[36]

A hardship dwelling is only allowed on property on which a dwelling already exists, and may only be allowed to be used as a residence while the occupant of the existing dwelling needs medical care for a health hardship.[37] Once the hardship ends, either by the death or return to health of the resident of the existing dwelling, the home must be demolished or converted to non-residential use.[38]

Like the rules limiting uses on Goal 3 agricultural lands, LCDC's rules for Goal 4 forestlands are equally limiting for the owners of those lands. Nearly all commercial and industrial uses—except those related to forestry or mining—are prohibited, and the siting of dwellings is significantly restricted.[39]

By rule, single family dwellings on Goal 4 lands are limited to three primary types: 1) "lot of record" dwellings, 2) large tract dwellings, and 3) "template" dwellings. A "lot of record" dwelling is allowed on certain types of less productive forest land for owners who have continuously owned their property since January 1, 1985.[40] A large tract dwelling is allowed on a tract of at least 160 acres in western Oregon and 240 acres in eastern Oregon.[41] A "template" dwelling may be allowed on small forest land tracts, based on a complicated test that requires the property owner to center a 160 acre square on his parcel and count the number of homes and parcels that are located within that 160 acre square, but with limitations.[42]

E. Statutes Regulating Rural Land

Although the Oregon Legislature delegated nearly limitless authority to LCDC to develop and implement the state's planning program, its authority is tempered by various state statutes providing specific limitations on

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[35] *Id.* 660-033-0130(3). This level of complexity permeates LCDC's administrative rules, even on such mundane matters as siting a dwelling on a small acreage parcel. *Id.*

[36] *Id.* 660-033-0130(4).

[37] *Id.* 660-033-0130(10).

[38] *Id.*

[39] *Id.* 660-006-0025.

[40] *Id.* 660-006-0027 (1)(a)–(d).

[41] *Id.* 660-006-0027 (1)(e).

[42] *Id.* 660-006-0027(1)(f)–(g).

property owners and LCDC. The primary source of limitations on rural property owners is found in the Oregon Revised Statutes (ORS) chapter 215. Among the statutes in chapter 215 are those declaring the state's agricultural land-use policy,[43] proscribing uses in exclusive farm use zones,[44] authorizing—with significant exceptions—certain dwellings in exclusive farm use zones and forest zones,[45] and limiting the creation of new parcels in exclusive farm use zones and forest zones.[46]

A number of specific statutes in chapter 215 stand out as creating fertile ground for Measure 37 claims.

- Both ORS sections 215.213 and 215.283 contain lists of uses allowed by owners of land zoned for exclusive farm use. Included in those uses are single family dwellings "customarily provided in conjunction with farm use."[47] This statutory language first appeared in 1963,[48] but was never interpreted further. In 1994, LCDC interpreted the phrase "customarily provided" to limit the siting of dwellings to those instances where the applicant could prove that he had produced $80,000 in gross farm income for two years in a row or three of the last five years.[49] It is hard to conceive that the 1963 legislature intended this type of standard, but the failure of the legislature to further define its intent allowed LCDC to "gap fill" by interpretation.

- ORS section 215.284 authorizes the siting of "non-farm" dwellings in exclusive farm use zones on poor quality soils in the Willamette Valley and on all land in exclusive farm use zones outside of the Willamette Valley, but only upon a finding that the proposed dwelling "will not force a significant change in or significantly increase the cost of accepted farming and forest practices," will not "materially alter the stability of the overall land-use pattern of the area," and "is situated on a lot or parcel or portion of a lot or parcel that is generally unsuitable for the production of farm crops or livestock or merchantable tree species."[50] This last standard, known as the "general unsuitability" standard, cannot be met if the parcel can reasonably be put to farm or forest use with another parcel, even if that parcel is in separate ownership.

- ORS section 215.705 creates the "lot of record" dwelling in exclusive farm use and forest zones. This provision applies to the owners of lots or parcels who have owned the land continuously since January 1, 1985, and applies only to parcels of low quality farm or forest land, small acreage parcels surrounded by other small acreage parcels, or land in tracts of 240 acres in eastern Oregon or 160 acres in western Oregon.

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43 OR. REV. STAT. § 215.243 (2003).
44 *Id.* §§ 215.243, 215.283.
45 *Id.* §§ 215.284, 215.705, 215.740, 215.750.
46 *Id.* § 215.780.
47 *Id.* §§ 215.213(1)(g), 215.283(1)(f).
48 1963 Or. Laws 1141.
49 OR. ADMIN. R. 660-033-0135(5) (2005).
50 OR. REV. STAT. § 215.284.

- ORS section 215.750 authorizes the siting of a "template dwelling" on tracts zoned for forest use that are in areas of smaller parcels with dwellings.

- ORS section 215.780 sets minimum parcel sizes on all land zoned for exclusive farm use and forest land. Minimum parcel sizes on lands zoned for exclusive farm use are eighty acres for land not designated rangeland and 160 acres for land designated rangeland. For land zoned forest land, the minimum parcel size is eighty acres.

III. THE IMPACT OF SENATE BILL 100 AND GOALS 3 AND 4 ON OREGON PROPERTY OWNERS

The effect of the adoption of Senate Bill 100 and its implementation by LCDC has been dramatic, particularly for the owners of land in rural areas. As a result of the broad language used to define agricultural land in Goal 3 and forest land in Goal 4, ninety-six percent of the privately owned rural land (land outside urban areas) in Oregon is zoned for exclusive farm use or forest use, regardless of the capability of the land for agricultural or forest production, and regardless of the actual use, current or historical, on the land.[51]

In raw land figures, the numbers are staggering. There are approximately 61,600,000 acres of land in Oregon.[52] Of that acreage, approximately 34,000,000 acres are owned by state, federal, and local governments.[53] Of the approximately 27,600,000 acres of privately held Oregon lands, 24,800,000 acres (an area larger than the total acreage of New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and New Jersey combined) are zoned for farm and forest uses, 1,000,000 acres are in rural zones other than farm and forest use, and 1,800,000 acres are in urban areas.[54]

Agricultural and forest zoning, as detailed above, resulted in a nearly complete sea change for nearly every rural property owner. Prior to the adoption of Senate Bill 100 and the statewide planning goals, zoning in rural areas—if there was any—was a matter of exclusive local control.[55] After the adoption of SB 100 and the broad definitions of agricultural land in Goal 3 and forest land in Goal 4, zoning in rural areas became a matter of nearly exclusive state control. SB 100 had little flexibility, blanket farm and forest zoning, tremendously difficult—if not impossible—standards to meet to qualify for a single family dwelling, and extremely limited opportunities for commercial or industrial development. In the span of a decade, the state disenfranchised thousands of rural property owners.

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51 OR. DEP'T OF LAND CONSERVATION AND DEV., NEW FIGURES SHOW HOW STATE'S RURAL LANDS ZONED 1 (1995).

52 *Id.*

53 *Id.*

54 *Id.*

55 *See* 1969 Or. Laws 578–80 (requiring each city and county to adopt a master plan).

Add to these requirements the adoption by the legislature of the eighty acre minimum parcel requirements of ORS section 215.780 and the regulatory scheme is complete. In most cases, rural Oregonians can no longer do anything with their land except farm it or use it for timber production, regardless of market forces, their personal desire or capability to do so, or whether either use made any economic sense.

IV. OREGON TAKINGS CLAUSE JURISPRUDENCE

A. Oregon Constitution

Given the scope and impact of Oregon's land-use regulatory system, frequent litigation under the Just Compensation Clause of the Oregon Constitution would seem to be an inevitable byproduct. This is particularly true given the method of constitutional interpretation chosen by the Oregon Supreme Court, in which the court attempts to "identify the historical principles embodied in the constitutional text and to apply those principles faithfully to modern circumstances."[56] But reported takings challenges to Oregon land-use regulations have been few and far between. There are two primary reasons for this lack of litigation.

First, the Oregon Supreme Court has interpreted the takings clause of the Oregon Constitution to provide that no taking occurs if the property owner retains "some substantial beneficial use" of the property.[57] By necessity, this subjective test results in an ad hoc, fact-based inquiry that provides little precedential value for subsequent litigants.

The seminal case on what constitutes a deprivation of "all economically beneficial use" of the property for purposes of the Oregon Constitution's takings clause is *Dodd v. Hood River County*.[58] In *Dodd*, the property owners purchased a forty-acre parcel of land, zoned for forest use in 1983, for $33,000.[59] At the time of the purchase, a single family dwelling was an authorized use on the property.[60]

Subsequent to the purchase of the property, but prior to the time of the plaintiff's request for approval to site a dwelling on the property, Hood River County, in order to bring their comprehensive plan and zoning ordinance into compliance with Statewide Planning Goal 4, adopted new regulations on the plaintiffs' property to prohibit the siting of a dwelling.[61] The plaintiffs submitted applications for a land-use permit, conditional use permit, and zoning and comprehensive plan change to allow the construction of a single family dwelling on their property.[62] As part of the application, plaintiffs

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[56] Coast Range Conifers, LLC v. State *ex rel.* Or. State Bd. of Forestry, 117 P.3d 990, 993 (Or. 2005).

[57] Fifth Ave. Corp. v. Washington County *ex rel.* Bd. of County Comm'rs, 581 P.2d 50, 60 (Or. 1978); Dodd v. Hood River County, 855 P.2d 608, 615 (Or. 1993).

[58] *Dodd*, 855 P.2d at 615.

[59] *Id.* at 610.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 611.

submitted a report from a forestry expert indicating that the value of plaintiffs' property without the ability to site a dwelling was $691.[63] The county's forester submitted a report indicating that the value of the timber on plaintiffs' property was $10,000.[64] Plaintiffs' applications were denied by the county and an appeal ensued.[65]

On review, the Oregon Supreme Court rejected plaintiffs' takings challenge. The court eschewed a formula based on the comparison between purchase price and current value with the regulation for determining whether the challenged regulation had resulted in loss of all economically beneficial use of the property.[66] Instead, the court decided that, on the facts presented in the case, a use that is capable of generating $10,000 in profit on land purchased for $33,000 "certainly constitutes some substantial beneficial use."[67]

In a rare moment of candor, the court acknowledged that it had not defined the factors that should be considered in analyzing a takings claim under the Oregon Constitution.[68] Unfortunately, the court then failed to enlighten the bench, bar, and citizenry with what it considered to be the factors needed to analyze a takings claim.

About the only thing that can be gleaned from the court's decision in *Dodd* is that a takings challenge under the Oregon Constitution *will not necessarily* be based on a comparison between the purchase price of the property and the fair market value of the property with the subsequent regulations. The challenge *may* be based on this analysis, or some other analysis known only to the Oregon Supreme Court, that will then be applied to the facts of the case in a manner known only to the Oregon Supreme Court. The litigants are then left to resort to guidance from a ouija board to determine whether they are advancing the appropriate arguments. This analysis hardly inspires confidence for property owners wondering whether a regulation has resulted in a taking of their property.

Since *Dodd*, no case has further identified the parameters of what constitutes sufficient deprivation of use as to amount to a regulatory taking by government pursuant to the Oregon Constitution.

B. United States Constitution

The Oregon appellate courts have fared no better in analyzing the requirements for a valid regulatory takings claim under the takings clause of the United States Constitution. Although a few Oregon cases cite to the three prong test for a regulatory taking found in *Penn Central Transportation Co. v. City of New York*,[69] the cases provide no guidance for litigants in the

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63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.* at 616.
67 *Id.*
68 *Id.* at 615 n.14.
69 438 U.S. 104 (1978).

proper interpretation of each prong, and the United States Supreme Court has not provided much guidance on applying the test.[70]

Rather than relying on the *Penn Central* methodology, Oregon appellate courts seem to prefer the two prong test for a Fifth Amendment taking first set out in *Agins v. City of Tiburon*.[71] The reasons for the court's reliance on *Agins* instead of *Penn Central* are unclear, but one could surmise that since the second prong of the *Agins* test approximates the "substantial economic use" test developed by the Oregon courts for interpreting regulatory takings under the Oregon takings clause, the courts felt more comfortable applying *Agins*.[72]

Unfortunately, Oregon case law interpreting *Agins* is nearly as cryptic as that interpreting the Oregon takings clause. The primary Oregon case interpreting *Agins* is *Cope v. City of Cannon Beach*.[73] In *Cope*, the plaintiff landowners challenged a municipal ordinance prohibiting the use of dwellings in residential areas of the city for "transient occupancy," which the city defined as rental of the dwelling for a period of less than fourteen days.[74] Plaintiffs commenced a facial challenge to the ordinance under the Fifth Amendment.[75]

The Oregon Supreme Court, relying on *Agins*, found that the city's ordinance did not affect a taking of the plaintiff's property. Applying the first prong of *Agins*, the court held that the ordinance substantially advanced a legitimate interest of the city, in that it protected the residential character of the area and expanded the supply of affordable housing for area residents.[76]

The court went on to find that the city's ordinance satisfied the second prong of *Agins*, as owners of dwellings in the city's residential areas could reside in the dwellings or could use them as long term rentals, either of which provided economically viable use of the properties.[77] Nothing in the court's opinion demonstrates that evidence was offered by plaintiffs to demonstrate a loss in value to plaintiff's particular parcel, most likely due to the fact that plaintiffs' challenge to the ordinance was a facial one.

Beyond *Cope*, there is little Oregon appellate court guidance to property owners wishing to make takings claims in Oregon courts under the Fifth Amendment. What little guidance exists cautions against the filing of a

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[70] For cases citing *Penn Central*, see *Marquam Investment Corp. v. Beers*, 615 P.2d 1064 (Or. Ct. App. 1980), *Cope v. City of Cannon Beach*, 855 P.2d 1083 (Or. 1993), and *Coast Range Conifers, LLC v. State* ex rel. *Oregon State Board. of Forestry*, 117 P.3d 990, 992–93 (Or. 2005).

[71] 447 U.S. 255 (1980).

[72] For cases citing and applying *Agins*, see *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992), *aff'd* 854 P.2d 437 (Or. 1993), *rev'd* 512 U.S. 374 (1994), *Nelson v. Benton County*, 839 P.2d 233 (Or. Ct. App. 1992), *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *Cope v. City of Cannon Beach*, 855 P.2d 1083 (Or. 1993), and *Rogers Machinery, Inc. v. City of Tigard*, 45 P.3d 966 (Or. Ct. App. 2002). The United States Supreme Court no longer applies the first prong of the *Agins* test as a criteria for evaluating a regulatory takings claim. *See* Lingle v. Chevron, 125 S. Ct. 2074 (2005) (rejecting the first prong of the test).

[73] 855 P.2d 1083 (Or. 1993).

[74] *Id.* at 1084.

[75] *Id.*

[76] *Id.* at 1086.

[77] *Id.* at 1086–87.

claim. Oregon property owners wishing to challenge a land-use regulation are thus left with little hope under the Oregon court's analysis of the state or federal takings clause.

The second reason for a lack of takings litigation concerning Oregon land-use regulations is the requirement that a property owner "ripen" a takings claims in order to pursue it in court, by submitting a sufficient land-use application to the public entity to demonstrate that the regulatory scheme results in sufficient deprivation of property use to constitute a taking.[78] Oregon appellate court decisions on ripeness mirror those of the United States Supreme Court, and require a property owner to submit at least two applications for uses on the subject property in order to demonstrate a claim is ripe.[79]

This "rule" can hardly be characterized as a hard and fast standard, however. By any account, the determination of whether a claim is "ripe" for judicial review is highly discretionary, fact specific, and in many cases, a matter left to the cleverness (or lack thereof) of counsel for the government. Neither Oregon appellate court case law nor that of the United States Supreme Court provides clear guidance for determining when a claim is ripe. In fact, the Oregon appellate courts appear to be satisfied in telling a property owner that a claim is not ripe, but do not seem to be inclined to provide any guidance as to what is required to ripen the claim.

As a result of the high standards set for demonstrating a regulatory takings claim, the lack of clear guidance from the Oregon appellate courts, and the inability or unwillingness of the courts to provide guidance as to when a takings claim is "ripe," it is nearly impossible for an Oregon property owner to file a successful regulatory takings claim, even if a land-use regulation triggers a loss of all (or nearly all) economic value of the property. Thus, property owners hurt by Oregon's land-use scheme have little hope in prevailing on an inverse condemnation claim under either the state or federal constitutions.

V. MEASURE 7 (2000)—THE VOTERS DEMAND CHANGE

Faced with the lack of an effective legal remedy to address the inequities resulting from Oregon's land-use planning system, the voters of Oregon approved Ballot Measure 7 in the November 2000 general election.[80] Measure 7 amended article I, section 18 of the Oregon Constitution by

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[78] For cases on the "ripeness" doctrine, see *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985), and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986).

[79] *See* Larson v. Multnomah County, 854 P.2d 476, 477 (Or. Ct. App. 1993), *aff'd on reh'g*, 859 P.2d 574 (Or. Ct. App. 1993) (dismissing claim for ripeness).

[80] Although a Marion County trial court enjoined the Oregon Secretary of State from canvassing the ballots cast on Measure 7 and certifying the results of the election, the Oregon Supreme Court recognized that official county elections results had demonstrated that the measure had passed. League of Or. Cities v. State of Or., 56 P.3d 892, 896 n.2 (Or. 2002).

adding six new subsections, the most significant of which was subsection (a) of the measure.[81]

Under Measure 7, the state or a local government was liable for payment of just compensation to a property owner for changes in the law that restricted the use of the owner's property and lowered the property's value. The measure applied to any enactment of state or local government, be it a law, administrative rule, ordinance, land-use goal or otherwise. There was no minimum amount of loss needed to trigger the just compensation requirement—any amount of loss was sufficient to generate a claim.[82]

Measure 7 contained exemptions for state and local laws prohibiting "historically and commonly recognized nuisance laws,"[83] regulations to implement a requirement of federal law, and regulations prohibiting the use of property for the purpose of "selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor."[84] It was the "pornography" exemption that led to the invalidation of the measure.

Before Measure 7 could take effect, its constitutionality was challenged by a cadre of proponents of Oregon's land-use planning system, locally elected officials, municipalities, and the lobbying organization for the state's cities. In *League of Oregon Cities v. State*,[85] the Oregon Supreme Court affirmed a ruling of the Marion County Circuit Court invalidating Measure 7.

According to the court, Measure 7 was void because it was not adopted in compliance with the requirements of the "separate votes" provision of article XVII, section 1 of the Oregon Constitution, as interpreted by the Oregon Supreme Court.[86] Under that provision, an amendment to the Oregon Constitution must be structured in a way that ensures that each amendment will be voted on separately.

The court held that Measure 7 expressly amended article I, section 18 of the Oregon Constitution and impliedly amended article I, section 8 of the Oregon Constitution, Oregon's free speech clause, by excluding government regulations that restrict the use of property for purposes of selling pornography from the just compensation requirements of the measure.[87] The denial of just compensation to those wishing to sell pornography limited the rights of the owners of those establishments, and thus constituted an implied change to article I, section 8.[88]

Based on the express change to Oregon's takings clause and the implied change to Oregon's free speech clause, the court held that two changes were made to the Oregon Constitution, and each should have been voted upon separately.[89] Because the changes appeared in the same measure, the

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[81] Ballot Measure 7 § (a) (Or. 2000), *available at* http://www.sos.state.or.us/elections/irr/2000/046text.pdf.

[82] *Id.*

[83] *Id.* § (b).

[84] *Id.* § (c).

[85] 56 P.3d 892, 904 (Or. 2002).

[86] *Id.* at 911 (citing to Armatta v. Kitzhaber, 959 P.2d 49 (Or. 1998)).

[87] *Id.* at 909.

[88] *Id.*

[89] *Id.* at 910.

measure violated the "separate votes" provision, and was void in its entirety.[90]

As can be expected, the test created by the Oregon Supreme Court for determining whether a measure adopted by Oregon voters violates the "separate votes" clause of the Oregon Constitution has proven controversial.[91] Nevertheless, by declaring Measure 7 to be in violation of the "separate votes" provisions, the Oregon Supreme Court put the death knell on the measure, and sent Oregon voters and Oregon property owners back to square one.

VI. MEASURE 37 (2004)—THE VOTERS SPEAK AGAIN

After the vote on Measure 7, the subsequent invalidation of the measure by the Oregon Supreme Court, and the failure of the 2001 and 2003 legislatures to address the discontent created by three decades of land-use regulations, it was not surprising that the Oregon voters would again be asked to vote on a property rights measure. Voters were given that opportunity with Measure 37.

A. The Campaign

Much like the campaign for Measure 7, the campaign for Measure 37 was expensive and extremely well publicized.[92] Faced with the realization that the voters had just four years earlier approved Measure 7, the opponents of Measure 37 raised a staggering $2.75 million to defeat the measure, while Measure 37's proponents raised just $1,253,450.[93]

The opponents of the measure focused on both the financial impacts of the measure and on the effect that the measure would have on Oregon

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[90] *Id.* at 910–11.

[91] *See* Daniel Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35 (2002) ("The only discernible 'purpose' behind Armatta's construal of the separate vote requirement as more restrictive than the single subject rule was that doing so enabled the Oregon Supreme Court to strike down an initiative constitutional amendment that its members did not like while pretending not to reverse its long string of precedents liberally interpreting both the legislative and initiative single subject rules."). *Id.* at 37.

[92] The committee formed to oppose the campaign was the Take A Closer Look Committee. *See* Take a Closer Look Committee, No on 37, http://takeacloserlookoregon.org (last visited Jan. 22, 2006). The committee supporting the campaign was the Family Farm Preservation PAC. Every major newspaper in Oregon published articles and editorials concerning the measure, and both proponents and opponents mounted significant media campaigns through television and radio advertising.

[93] The proponents began the election cycle with a campaign balance of $264,991.47. Electronic Filing Report, Summary Statement of Contributions and Expenditures, Family Farm Preservation PAC 1 (Sept. 23, 2004), *available at* http://egov.sos.state.or.us/elections/elec_images/4668_2004_G100_1STPRE.pdf. During the election cycle, the proponents raised another $988,248.52, Electronic Filing Report, Summary Statement of Contributions and Expenditures, Family Farm Preservation PAC 1 (Sept. 9, 2005), *available at* http://egov.sos.state.or.us/elections/elec_images/4668_2005_SUPL_SUPP.pdf, for a total of $1,253,240.00. The opponents, on the other hand, raised $2,727,828.03. Electronic Filing Report, Summary Statement of Contributions and Expenditures, No on 37 Take a Closer Look Committee 1 (Dec. 2, 2004), *available at* http://egov.sos.state.or.us/elections/elec_images/4847_2004_G100_POST.pdf.

farmland.[94] In the opponents' most widely used television ad, a man riding a tractor in a farm field proclaimed that Measure 37 would "weaken the laws that protect Oregon farmland from overdevelopment," and "let government decide one thing for my neighbor's property, and something different for mine."[95] Thus the effort was to focus on the impact of the measure on land-use planning.

These themes also appeared throughout the opponents' statements appearing in the Oregon voters' pamphlet.[96] For example, in the first statement in opposition, the Hood River County Farm Bureau indicated that approval of Measure 37 would allow an owner of real property to "put a development on the land that is clearly not compatible with surrounding land uses, creating a hodgepodge of land uses that Oregonians have tried to avoid with the concept of land use planning."[97]

According to a cadre of Oregon environmental groups, Measure 37 would generate claims on up to one-half of Oregon's prime farmland, and would result in strip malls and big box stores sprouting from our farmland, instead of the crops that feed us, unless taxpayers paid hundreds of millions of dollars to stop this development.[98] The focus on Oregon's land-use system was echoed by the statement of 1000 Friends of Oregon, who claimed that approval of Measure 37 was a "dangerous threat" to Oregon's land-use planning laws.[99]

Oregon's print media echoed the same message as the opposition campaign. The *Oregonian*, Portland's major daily newspaper, printed three editorials in the span of three weeks in opposition to the measure.[100] One article complained that the measure would "put the state in a bind: Pay billions in claims or waive the rules and usher in a new era of willy-nilly development."[101] A second editorial claimed that "supporters of Measure 37 want to ruin something that money can't buy, something integral to Oregon's beauty, economy and identity: Oregon's land use laws."[102]

On the other side of the issue, Measure 37 proponents emphasized the unjust results that had been generated by Oregon's peculiar and unique land-use system. In an effort to go beyond the vague description that Oregon's land-use planning system is good, the television and radio ads presented by the proponents of the Measure focused on individual Oregon families who

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[94] The arguments raised by the opponents of Measure 37 may be found on their website, Take a Closer Look Committee, *supra* note 92.

[95] Take a Closer Look Committee, TV Spot, http://www.takeacloserlookoregon.org/press/TV_spot.htm (last visited Jan. 22, 2006).

[96] Measure 37 Opposition Statements, *in* 1 VOTER'S PAMPHLET 103, 103–132 (Office of the Or. Sec'y of State ed., 2004), *available at* http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf.

[97] *Id.* at 119.

[98] *Id.* at 125.

[99] *Id.* at 129.

[100] *See* Take a Closer Look Committee, *Breaking News*, http://www.takeacloserlookoregon.org/press/ (last visited Jan. 22, 2006).

[101] Editorial, *Vote No on Measure 37*, OREGONIAN, Oct. 8, 2004, at D08, *available at* 2004 WLNR 17918408.

[102] *Don't Sanction this Shakedown*, OREGONIAN, Oct. 17, 2004, at D04, *available at* 2004 WLNR 17927440.

had been hurt by that system, and the impact that those regulations had had on their lives. For example, in a radio spot in support of the measure, 91-year-old widow Dorothy English described her battle with Multnomah County over the use of her land, stating, "I'm 91 years old, my husband is dead, and I don't know how much longer I can fight."

This argument was central to the proponents' voters' pamphlet statements as well. Of the forty voters' pamphlet statements endorsing the Measure, seventeen were from individuals describing the impact of Oregon's system on their lives and property.[103]

Both themes (compensation and restoration of rights) were reflected in the ballot title for the measure prepared by the Oregon Attorney General's office.[104] The ballot title is an important part of an Oregon initiative, as it appears on the ballot and is the only explanation of each measure that appears directly on the ballot.

By all accounts, Measure 37 was a highly publicized measure, with a well funded opposition campaign, editorials in all major daily newspapers, a ballot title prepared by the Oregon attorney general that accurately described the measure as the choice of government to either pay just compensation or restore the rights that property owners had at the time they purchased their land, and a series of voters' pamphlet statements from Oregon property owners, politicians, retired judges, and interest groups.

B. The Results

After a long and hard fought campaign, the results of Measure 37 were not nearly as close as predicted. The measure was approved by Oregon voters with nearly sixty-one percent of the vote.[105] The measure passed in thirty-five of Oregon's thirty-six counties, including Multnomah County, the most urban county in Oregon.[106]

C. The Measure Itself

Taking a cue from the Oregon Supreme Court's 2002 invalidation of Measure 7, Measure 37 was drafted and presented to the voters as an amendment to the Oregon Revised Statutes, and not the Oregon Constitution. The Measure contains 13 subsections, some substantive and some procedural.[107]

Subsection (1) of the measure requires a public entity enacting or enforcing a new land-use regulation or enforcing a land-use regulation enacted prior to the effective date of the measure to pay just compensation

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103 Measure 37, *supra* note 96, at 105–08.

104 *See* Press Release, Bill Bradbury, Or. Office of the Sec'y of State, Certified Ballot Title for Measure 37 (Apr. 22, 2003), *available at* http://www.sos.state.or.us/elections/irr/2004/036cbt.pdf.

105 *See* Or. Sec'y of State, General Election Abstract of Votes on State Measure No. 37 (Nov. 2, 2004), *available at* http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf (outlining county by county the votes on Measure 37).

106 *Id.*

107 Ballot Measure 37 (Or. 2004).

to the owner of private real property if the regulation limits the use of the property and lowers the property's fair market value. This subsection, along with subsection (8), forms the heart of the measure.

Subsection (2) of the measure provides that just compensation shall be determined by calculating the reduction in fair market value to the real property resulting from enactment or enforcement of the regulation as of the date a claim is filed under the measure by the property owner, and not some other date in time, such as the date the regulation is enacted.

Subsection (3) of the measure contains exemptions from the requirement of just compensation for the following five categories of regulations:

1. Regulations restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This provision has yet to be proven controversial. It was seemingly ignored by opponents during the Measure 37 campaign, who asserted that approval of the measure would result in pig farms in residential neighborhoods and open pit leach mines on forest land.[108]

2. Regulations restricting activities for the protection of the public health and safety. This provision will likely result in litigation. It is hard to imagine how a legislative body (in this case the citizens of Oregon) could reasonably create, much less agree upon, a list of which particular regulations, limiting the use and reducing the value of private real property, are designed to protect the public's health and safety and which are designed to provide public benefits. On one extreme are laws regulating the construction standards for development, such as building codes and fire codes, which have the primary (if not exclusive) purpose of protecting the health and safety of the public. On the other extreme are laws regulating property for the promotion of aesthetics, historic preservation, "farmland" protection, or open spaces. While these laws may be desirable to the public, they are not likely to be drafted for the protection of the public's health and safety.

   In the middle lie a host of other laws regulating the use and conduct of real property, some of which may have the purpose of providing benefits to the public and protecting the public's health and safety. While it would be desirable to draft a measure that provides a clear and unambiguous answer to whether a particular law is designed for one purpose or the other, and thus whether that law is subject to Measure 37 or not, this is an impossible task, given the variety of regulatory schemes and the multi-purpose land-use regulations created in our society. Thus litigation over this exception is likely, until the Oregon appellate courts create a body of case law to guide future regulations and claims.

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108 *See* Measure 37, *supra* note 96, at 118; *see also* Tim Fought, *Want Hog Factory? Vote Yes on 37*, HERALD AND NEWS, Oct. 8, 2004, *available at* http://www.takeacloserlookoregon.org/press/herald_and_news.htm (asserting that with Measure 37 in place, a hog factory could be built where current zoning regulations would not allow it).

3. Regulations that are required to comply with federal law. The purpose of this provision is to not require state and local governments to compensate property owners for regulations which they cannot avoid. Litigation over this exception will in all likelihood center on the word "required," as state and local governments will attempt to tie land-use regulations that would otherwise trigger claims into a federal program, and argue that "the feds made us do it."

4. Regulations restricting or prohibiting the sale of pornography or performance of nude dancing. The measure specifically provides, however, that nothing in this exception alters rights granted under the Oregon or United States Constitutions, which seems patently obvious, but which ensures that if a zoning regulation of these industries survives constitutional analysis, it will not trigger a claim under Measure 37.

5. Regulations enacted prior to acquisition of the property by the owner or a family member, which can date back to a parent or grandparent of the current owner. This provision is designed to ensure that the measure acts as a "grandfather clause" rather than an attack on zoning regulations.

Subsection (4) of the measure allows a 180-day "grace period" from the date a claim is filed before just compensation is due. The purpose is to provide time for public entities to evaluate a claim, hold public hearings, and decide on a course of action based on that evaluation and any underlying proceedings.

Subsection (5) of the measure contains a statute of limitations for claims made under the measure. Claims based on land-use regulations enacted prior to the effective date of the measure may be filed within two years of the effective date of the measure or within two years from the date a land-use application is denied based on the regulations subsequently challenged, whichever occurs later.

Subsection (6) of the measure creates a cause of action for just compensation in the circuit court in which the property is located, if a challenged land-use regulation is still applicable to property more than 180 days after a claim is filed. This subsection also provides for attorney fees and costs to a successful claimant.

Subsection (7) of the measure provides that a local government may create procedures for processing claims under the measure, but that compliance with these procedures is not a prerequisite for filing a cause of action under subsection (6) of the measure. The purpose of this subsection is to eliminate a ripeness requirement for property owners wishing to seek just compensation under the measure.

Subsection (8) of the measure provides that the governing body responsible for enacting the challenged land-use regulation can avoid the payment of just compensation under subsection (1) of the measure by "modifying, removing, or not applying" the challenged regulation to allow

"the owner to use the property for a use permitted at the time the owner acquired the property."

The purpose of subsection (8) is to provide an alternative remedy that is the equivalent to payment of compensation. If a property owner desires to be made whole by receiving just compensation equal to the impact that a challenged regulation has on the fair market value of his property, then the governing body has the option to make the property owner whole by returning the property to the status it had at the time it was acquired by the owner.

This subsection has proven to be the most controversial and litigated subsection of the measure. The controversy centers around the rights a property owner has when a public entity chooses to avoid payment of just compensation under the measure by "modifying, removing, or not applying" regulations. On February 24, 2005, the Oregon Attorney General publicized a non-binding "letter of advice" that had been sent to the Oregon Department of Land Conservation and Development.[109] In the letter, a deputy attorney general opines that the rights obtained by a property owner under subsection (8) of the measure are personal to the owner, and may not be transferred to third parties.[110] Following that logic, a successful claimant who receives the right to use the property in lieu of just compensation under subsection (8) of the measure must vest the development rights allowed under the measure before the property is transferred.[111]

The flaw in the attorney general's logic is obvious when analyzed against the text and context of the measure. Under subsection (1) of the measure, just compensation is due when a land-use regulation restricts the "use" of the "property." Both the Oregon and United States Supreme Courts have held that "property" includes not only the mere physical thing which is owned, but also the right to acquire, use, and dispose of that physical thing, and nothing in the text of the measure indicates that a narrower definition was intended.[112] Thus a regulation restricting the right to alienate the property would trigger a claim for just compensation under subsection (1) of the measure, as the regulation would restrict the "use" of the "property."

Under subsection (8) of the measure, just compensation may be avoided, but only if the governing body allows the property owner to use the "property" for a "use" permitted when the property was acquired. There is no indication in the measure that the terms "use" and "property" were intended to be different than they were in subsection (1) of the measure. If that is true, then the attorney general's argument cannot stand, as the "use" of the

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109 Letter from Stephanie Striffler, Special Counsel to the Attorney Gen., State of Or., to Lane Shetterly, Director, Or. Dept. of Land Conservation and Dev. (Feb. 24, 2005), *available at* http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf.

110 *Id.*

111 *Id.*

112 *See* Buchanan v. Warley, 245 U.S. 60, 74 (1918) (stating that "property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it."); Kenji Namba v. McCourt, 204 P.2d 569, 574 (Or. 1949) (discussing the constitutional right to use, lease, and dispose of land).

property would include the right to alienate the property, along with the right to develop the property.

Moreover, the attorney general's definition makes little common sense. Nothing in the campaign provides that the voters intended for a property owner to regain the right to use his property in the way he could when he acquired it, but not be able to transfer those rights. The attorney general's argument is currently being challenged,[113] and will be resolved relatively quickly by the Oregon appellate courts, thus eliminating the most fundamental source of contention under the measure.

Subsection (9) of the measure provides that any decision made under the measure is not considered a "land use decision." The purpose of this subsection is to clarify that the Oregon Land Use Board of Appeals, an executive branch agency created exclusively to review local government land-use application decisions, will not review local government decisions of claims under the measure.

Subsection (10) of the measure requires a public entity to segregate funds for payment of claims under the measure, rather than using money from the general fund. In addition, this subsection provides that the public entity need not use available funds to pay claims, and may instead continue to modify, remove, or not apply regulations under subsection (6) of the measure. Finally, this subsection provides that the failure of a public entity to pay just compensation within two years from the date it accrues will result in the property owner being allowed to use the property as permitted when it was acquired.

Subsection (11) of the measure is the definitions section, subsection (12) of the measure specifies that the rights created by the measure are in addition to any rights guaranteed by the Oregon or United States Constitutions, and subsection (13) of the measure contains a severability clause.

In total, the measure is intended to be complete in itself, with substantive and procedural rights specified in the measure. Given the complexities of Oregon's land-use planning system and the broad authority of governments to impose regulations of virtually any nature, it is asking too much to expect that there will be no litigation regarding the terms of the measure, or the application of the measure to various factual situations.

The most ardent defenders of Oregon's land-use planning system seem to forget that Senate Bill 100 (1973), amended countless times over the years due to vagaries in the original language,[114] has spawned endless litigation,[115]

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113 *See* Complaint at 13, Crook County v. All Electors, No. 05CV0015 (Crook County, Or. Cir. Ct. Feb. 3, 2005) (county seeking a declaration by the court of the validity of the County's Measure 37 ordinance, which provides that a property owner may transfer rights obtained through a Measure 37 claim to subsequent property owners).

114 One need only look at the legislative history of the various statutes of ORS chapters 197 and 215 to see the number of times the state's planning legislation has been altered.

115 For example, in the fiscal year ending July 1, 2005, the Oregon Land Use Board of Appeals issued final orders in 153 cases. *See* Land Use Board of Appeals Annual Report July 1, 2004–June 30, 2005, http://luba.state.or.us/Performance%20Measures/Annual%20Report.htm (last visited Jan. 22, 2006). LUBA is currently publishing volume 49 of the LUBA Reports, a reporter containing all final orders issued by LUBA since its inception in 1979.

and has resulted in the creation of two separate state agencies,[116] costing taxpayers millions of dollars annually to staff and operate. That it will take time to develop a body of case law interpreting Measure 37 should surprise no one.

VII. THE FUTURE OF MEASURE 37

Despite significant majority support for property rights in Oregon, the future of Measure 37 is cloudy. On October 14, 2005, a Marion County trial court judge struck down the measure on the ground that it violated several provisions of the Oregon Constitution.[117] The ruling was surprising to supporters and opponents of the measure, and is currently being appealed to the Oregon Supreme Court.

According to the trial court, Measure 37 violates the following four provisions of the Oregon Constitution: 1) the authority of the legislature to adopt legislation, 2) the equal privileges and immunities clause, 3) suspension of laws, and 4) separation of powers. The trial court also found that Measure 37 violates the procedural and substantive due process provisions of the Fourteenth Amendment. Each is discussed below.

A. Legislature's Plenary Power

The trial court held that Measure 37 violates the authority of the legislature to adopt legislation, a power which is inherent in the Oregon Constitution.[118] After citing cases for the proposition that the state cannot contract away its police power, the court held that a law prohibiting the legislature from exercising its plenary power is an unconstitutional curtailment of legislative power.[119] Applying that standard to the measure, the trial court found the measure to be unconstitutional.[120] According to the court, the measure requires the government to pay to enforce valid land-use regulations, which acts as a limitation on the plenary power, and is thus invalid.[121]

The court rejected (without citation to authority) arguments from the state and the measure's chief petitioners that the measure does not bind the legislature, which is free to repeal the law, amend it, or enact land-use legislation with express exclusions from the measure.[122] This fact, according to the trial court, did not save the measure.[123]

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116 The Oregon Land Use Board of Appeals and the Oregon Department of Land Conservation and Development.

117 *See* MacPherson v. Dep't of Admin. Servs., No. 05C10444 (Marion County, Or. Cir. Ct. Oct. 14, 2005), *available at* http://www.ojd.state.or.us/mar/documents/Measure37.pdf.

118 *Id.* at 10.

119 *Id.* at 11.

120 *Id.* at 23.

121 *Id.* at 11.

122 *Id.*

123 *Id.*

Yet the fact that Measure 37 does not bind the legislature is precisely why it does not act as a limitation on the legislature's plenary power to impose land-use regulations. Assuming that the Oregon Legislature's plenary power is limited only by the Oregon Constitution, there is no requirement that the legislature comply with the provisions of Measure 37.[124] If the legislature is not bound to comply with the provisions of Measure 37, then the measure simply cannot act as a limitation on the legislature's authority, no matter what it requires.

Nor does Measure 37 prohibit the legislature from exercising its plenary power to enact land-use regulations. As the trial court correctly noted, Measure 37 does not prohibit the adoption of any land-use regulation. Thus, according to the test created by the court, the measure should survive constitutional scrutiny.

Nevertheless, after announcing that legislation prohibiting the legislature from exercising its plenary power would violate the Oregon Constitution, the court proceeded to ignore its own test to hold that any legislation that imposes limitations on the government's exercise of its plenary power is unconstitutional. This sweeping pronouncement, if upheld by the Oregon Supreme Court, would have profound impacts on the ability of the citizens and the legislature to place effective limitations on their authority.[125] Fortunately, the holding is so fundamentally flawed that its chances of surviving appellate court review seem slim.

B. Equal Privileges and Immunities

The trial court next found that Measure 37 violates article I, section 20 of the Oregon Constitution, the equal privileges and immunities clause.[126] According to the court, Measure 37 affects property owners who purchased their land before land-use regulations were enacted differently from those who purchased their land after the adoption of land-use regulations. The court noted that these classes were separate and distinct apart from the measure, and constituted "true classes" as that term is used in case law interpreting the privileges and immunities clause.[127]

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124 *See* Hughes v. State, 838 P.2d 1018, 1025 (Or. 1992) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810), for the proposition that "one legislature is competent to repeal any act which a former legislature was competent to pass").

125 *See* Charles Delafuente, People's Law Can't Limit Legislature, Judge Says, ABA Journal e-Report, Nov. 4, 2005, http://www.abanet.org/journal/ereport/n4land.html (last visited Jan. 22, 2006). In that article, Oregon Assistant Attorney General Stephen Bushong is quoted as saying, "The basic theory of the ruling is that legislation that conditions future regulatory actions upon payment of compensation would be impermissible now. That cuts across a wide variety of legislation, certainly at the state level, and could potentially affect the ability to regulate." *Id.*

126 *MacPherson*, No. 05C10444, slip op. at 13. "No 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." OR. CONST. art. I, § 20.

127 The privileges and immunities clause protects only "true classes" from disparate treatment. *See* State *ex rel.* Huddleston v. Sawyer, 932 P.2d 1145, 1153 (Or. 1997), *cert. denied* 522 U.S. 994 (1997); Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 445 (Or. Ct. App. 1998).

Because the court found that Measure 37 affects "true classes" differently, it proceeded with its analysis of the measure. The court held that the classes were not suspect, and thus applied rational basis review to determine whether the distinction made under the measure—to provide compensation only to those owners who purchased their land before the adoption of a particular land-use regulation, and not to those owners who purchased after a regulation was enacted—was reasonably related to a legitimate state interest. Applying rational basis review, the trial court found Measure 37 unconstitutional. According to the court, the fact that the compensation requirement of subsection (1) of the measure impeded the legislature's ability to adopt land-use regulations meant that the measure could not further a legitimate state interest.

Based on a series of factual assumptions created by the court, the court determined that the means chosen to provide compensation was not reasonably related to the interest of protecting property owners. Valuing the decline in fair market value based on the current market was not reasonably related to the interest of compensating the property owner for losses resulting from the imposition of land-use regulations, the court noted that as events outside of the adoption of the challenged land-use regulation could have had an effect on the fair market value of the property, and thus lead to differences that do not reflect the actual injury resulting from the adoption of the challenged regulation.[128]

The court's holding regarding privileges and immunities has multiple flaws, each fatal to the analysis and result reached by the court. The first flaw is the finding that there are two "true classes" of property owners for purposes of rational basis review. As the court properly notes, a true class is a class that is "defined in terms of characteristics that are shared apart from the challenged law or action."[129]

Prior to the adoption of Measure 37, with limited exceptions,[130] there were no separate classes of property owners based solely on date of acquisition of the land. Some property owners purchased their land in 1965, others in 1985, and some in 2005. But for purposes of the receipt of just compensation under the takings clause or the applicability of current zoning, all property owners were treated the same.[131]

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[128] *MacPherson*, No. 05C10444, slip op. at 14. In a show of understanding of the beliefs of those voting for Measure 37, the court referred to the payment of just compensation as a "windfall" to the property owner. *Id.* Would the court label the return by the police of stolen merchandise to its rightful owner a "windfall" to that owner?

[129] *Id.* at 13 (quoting *Tanner*, 971 P.2d at 445).

[130] As discussed above, ORS section 215.705 allows a property owner to site a single family dwelling on certain non-productive or low productive farm or forest land if, among other conditions, the property owner purchased the property prior to January 1, 1985. ORS section 215.130(5) allows a property owner making a use of the property that is no longer allowed under existing land-use regulations to continue that use, based on the date the use began. Under the trial court ruling in this case, both of those statutes appear to violate the privileges and immunities clause.

[131] The Oregon Supreme Court does not recognize the concept of "investment backed expectations" when evaluating takings claims under article I, section 18 of the Oregon Constitution. Dodd v. Hood River County, 855 P.2d 608, 615 (Or. 1993).

It was not until the adoption of Measure 37 that the date of acquisition of property became relevant for purposes of determining the rights of a property owner. Thus the class of property owners has no relevant characteristics outside of the measure itself, and do not constitute a "true class" for purposes of review.

Moreover, the notion that there are two classes of property owners in Oregon (those that purchased property before land-use regulations and those that purchased property after land-use regulations) is grossly oversimplified. Property is bought and sold on a continuous basis, and land-use regulations are enacted and amended continuously as well. In any given area, finding two property owners who were subject to the same regulations at the time they purchased their land, and thus were members of the same "true class" may be impossible. In reality, if based solely on the date of purchase and the land-use regulations in place at that time, there are multiple "classes" in Oregon, not just two.

The fact that just compensation is calculated under the Measure in terms of the difference in current fair market value between the property with and without the challenged regulation does not make the law violate rational basis review. The trial court is correct that the purpose of Measure 37 is to place property owners in the same position that they were in at the time they acquired their property. The trial court is also correct that factors occurring after the adoption of land-use regulations may have increased the value of the property (or decreased the property's value, a fact which the court ignored).

But it is certainly rational for the legislature to ignore the fluctuations in value caused by factors outside of the loss caused by the challenged regulations and the difficulty that would be encountered by government, the appraisal industry, and property owners in attempting to calculate a loss based on market factors and property conditions in place decades earlier when deciding the proper timing for calculating fair market value. The specificity imposed by the trial court is not akin to rational basis review—rather, it is akin to strict scrutiny.

Finally, the notion that Measure 37 treats property owners differently is simply wrong. Under the measure, every Oregon property owner has exactly the same rights—the rights that they had at the time they purchased their land. That these rights may or may not result in the same allowed uses or the same amount of just compensation is not the result of changes brought about by Measure 37. Instead, it is the result of frequent amendments to state and local land-use regulations, creating situations where the uses and value of one's property today may be completely different tomorrow, subject to the whims of state and local government.

C. Suspension of Laws

According to the trial court, Measure 37 also violates article I, section 22 of the Oregon Constitution, which prohibits the suspension of laws,

except by authority of the legislative assembly.[132] According to the court, the provision in subsection (8) of the measure allowing state or local government to avoid the payment of just compensation by modifying, removing or not applying the challenged land-use regulations acted as a suspension of those particular challenged regulations. Thus, in the court's opinion, the measure itself acted as a suspension of laws.

The court proceeded, however, to hold that because the measure was approved by the people, it was an act of the legislative assembly, which would seem to make it compatible with article I, section 22. Nevertheless, the court held that because the measure violates the privileges and immunities clause of article I, section 20 of the Oregon Constitution, it also violates the suspension clause.

It is hard to discern any logic in the court's analysis of this section of the Oregon Constitution. The fact that the court believed that Measure 37 violated the privileges and immunities clause provides no reason to conclude that it violates the suspension of laws clause, or any other constitutional section.

Moreover, it cannot be said that the measure suspends laws. In fact, the measure does not require state government to suspend any laws. At best, a decision by a public entity not to apply a land-use regulation will be made in the course of a separate proceeding based on a claim filed by an applicant under the measure. This will only occur if a decision not to provide just compensation is made. Therefore, unless and until that event occurs, the same land-use regulations that were in place prior to the enactment of the measure for that property continue to be in place today.

And even if Measure 37 itself operates to "suspend laws," the trial court acknowledged that the measure was adopted by the "legislative assembly," as that term is used in the clause. The language of the clause itself authorizes the legislative assembly to suspend laws. If a vote of the people constitutes action by the "legislative assembly," then how can the measure possibly violate that clause?

D. Separation of Powers

The trial court held that Measure 37 violates the separation of powers provisions of article III, section 1 of the Oregon Constitution.[133] According to the court, the legislature cannot delegate power it does not have, and the legislature lacks authority to delegate to public entities the right to make decisions that limit the legislature's plenary power, violate the privileges and immunities clause, and suspend land-use regulations. Essentially, this

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[132] *MacPherson*, No. 05C10444, slip op. at 15. "The operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly." OR. CONST. art. I, § 20.

[133] *MacPherson*, No. 00C15769 at 19. "The powers of the government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." OR. CONST. art III, § 1.

argument is simply a carryover from the court's earlier findings, and will fail if the other holdings fail.

E. Due Process

Finally, the trial court held that Measure 37 violates both the procedural and substantive due process provisions of the Fourteenth Amendment to the United States Constitution. The court found that the measure did not prescribe a procedural process to be followed by public entities for the handling of claims under the measure. Furthermore, according to the court, judicial remedies, including the writ of review under ORS section 34.010[134] and an appeal under the Oregon Administrative Procedures Act[135] were insufficient to afford due process to property owners who were adversely affected by a decision involving a claim under the measure. The court went on to hold that Measure 37 violates the substantive due process rights of neighboring property owners because the voters could not have had a legitimate reason for enacting the measure and because it imposes a limitation on the government's plenary power. Neither of these holdings passes the smell test.

The problem with the trial court's procedural due process theory is that Measure 37 does not in any way preoscribe a process for handling of claims under the measure. Instead, each public entity responsible for resolving claims under the measure may enact its own process that complies with due process requirements and best fits the needs of the community. If a public entity does not enact procedures that provide for adequate process, then individual determinations made under the measure would presumably be subject to challenge by parties that could demonstrate standing. But that hardly implicates the measure itself, and should not result in invalidation of the measure.

The substantive due process holding is another variation on the plenary power argument. The cour'ts argument is ironic. The rights of neighboring landowners to having their property devalued by development by adjacent property owners under the measure constitute protected property interests under the United States Constitution, yet the voters had no legitimate reason for seeking a method to protect their right to use their own property in a state where the rights of property owners have been subjugated to the will of an overzealous executive branch. If the court's plenary power holding is rejected, then its procedural due process holding will likely be rejected as well.

VIII. THE FUTURE OF OREGON'S LAND-USE PLANNING SYSTEM

Regardless of the outcome of the Measure 37 litigation, Oregon's land-use planning system must change to accommodate the desire of the public to avoid the inequities that plague the existing system. This will require

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134 Providing for review of local government decisions.

135 OR. REV. STAT. § 183.310–.702 (2003) (providing for review of state agency decisions).

change in what opponents of Measure 37 consider to be the most sacred of all aspects of Oregon's system, its rural land regulations.

To ease the burden on rural property owners, LCDC should revisit and modify its definition of agricultural land in Goal 3 and forest land in Goal 4. Blanket zoning nearly the entire state is not planning—it is regulation. Recognizing the distinctions between irrigated cropland and high elevation eastern Oregon sagebrush and lava is critical to maintaining a legitimate argument that the system really is about protecting "farmland" and "forest land" and not simply open space protection at the expense of rural landowners.

LCDC should also repeal the $80,000 and $40,000 income standards for building a home in an exclusive farm use zone. There is no reason why the owner of a lot or parcel should be prohibited from building a single family dwelling on his land. Oregon is the only state with a farm income test for determining whether a family can live on their land. This should change.

The legislature should create a compensation fund for compensating those who have been asked to bear disproportionate burdens resulting from land-use regulations. If Measure 37 is upheld, the legislature can incorporate the fund directly into the measure. If Measure 37 is declared unconstitutional, the legislature should create a "variance" procedure allowing for those disproportionately impacted by land-use regulations to make use of their property, and can incorporate a compensation mechanism into that legislation.

There are multiple ways to create the fund, from capturing a portion of the increase in Oregon capital gains and property taxes generated by Measure 37 development and dedicating that to a fund, to imposing a slight capital gains tax increase on land purchased by its current owner as non-developable and newly upzoned for development.

The legislature should repeal ORS section 215.780, which establishes the 80-acre minimum parcel size in farm and forest zones. Local governments should be allowed to create their own minimum parcel sizes, based on the needs and desires of each community. In that vein, the legislature should restore significant authority to local governments to plan their own communities, reducing the state's role to issues of significant statewide concern, and bringing Oregon in line with the rest of the country.

IX. CONCLUSION

Regardless of the outcome of the litigation surrounding Measure 37, the voters of Oregon have indicated their desire for reform to Oregon's outdated land-use system. Unless the Oregon courts, legislature, and governor address the inequities recognized by the 1973 legislature at the time of the adoption of Senate Bill 100, our 32 year "planning experiment" will implode at the hands of a frustrated citizenry. The time to act is now.