YEAR ZERO: THE AFTERMATH OF MEASURE 37

BY

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The adoption of Measure 37 on November 2, 2004, has significantly altered the land-use planning landscape in Oregon. In brief, the Measure requires either payment for "lost value" of real property due to land-use regulations—or, alternatively, waiver of those regulations—enacted after acquisition of the property by the "present owner." Although the constitutionality of this Measure is currently before the Oregon Supreme Court for consideration, even if the Measure is ultimately found unconstitutional, its effects will continue to ripple through Oregon, as well as the rest of the country, long into the future.

The article opens discussing the Oregon land-use planning system before adoption of the Measure. That system requires the adoption of comprehensive plans and land-use regulations at all levels of local and regional government consistent with a series of uniformly applied statewide land-use goals. Land-use decisions involving individual parcels of land must be consistent with the regulations and the plan. The result is uniformity and relative predictability in land-use decisionmaking.

Next, the article explores how the Measure operates based on the experience of public entities dealing with the first claims made under the Measure. Measure 37 imposes a land-use system based on the time an individual took ownership in the property, as well as on unstated and incoherent claims of "reduction of value" rather than a uniformly imposed requirement based on public policy values. The article continues, suggesting how the state's land-use planning program can cope with the Measure in its current form and explores some of the likely areas where the Measure may be amended by either the legislature or through the initiative process. The article closes with predictions regarding the short- and long-term impacts of Measure 37 including loss of farmland, further sprawl, loss of a cohesive and coordinated land-use program, and, most importantly, the onset of sclerosis of the state's land-use planning system.

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I. INTRODUCTION

Oregon's experience with Measure 37 has only just begun. Oregon voters passed the Measure on November 2, 2004, and it became effective on December 2, 2004. In brief, the Measure required either payment[1] for "lost value" of real property due to land-use regulations, or, alternatively, waiver of those regulations enacted after acquisition of the property by the "present owner."[2] Other state legislatures are likely to be faced with proposals similar to Measure 37, and property rights groups will either propose similar legislation, or, as in Oregon, use the initiative process to bring the question to the voters directly.

This article discusses the Oregon land-use planning system (not altered by the adoption of Measure 37), sets out the various features of the Measure,

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[1] Although the Measure uses the words "just compensation" in its provisions, this term tends to be conflated with the use of that term in eminent domain law. Indeed, nothing is constitutionally "lost" by land-use regulation short of a deprivation of all economic value. As such, this article uses the words "payment" or "government payment" in lieu of that term.

[2] Ballot Measure 37 § (8) (Or. 2004).

and relates the experience of Oregon public entities in dealing with the first claims made under the Measure. It then suggests how the state's land-use planning system can cope with the current version of the Measure, and explores some likely areas in which the Measure may change in the not-too-distant future. Finally, this article examines the greatest danger posed by the Measure, which involves neither payment nor waiver, but rather the onset of sclerosis of the state's land-use planning system.

During the drafting of this article, the circuit court for Marion County heard a facial challenge to Measure 37 and struck it down on a number of state and federal constitutional grounds.[3] At the time of publication of this article, an appeal of the judgment of the circuit court is pending before the Oregon Supreme Court, and a decision on the matter is not expected until at least the spring of 2006.

As a result of the circuit court judgment, the State of Oregon and four counties (Marion, Washington, Clackamas, and Jackson) have been enjoined from accepting or processing Measure 37 claims.[4] However, it is not clear whether non-participating counties, as well as cities, are bound by the judgment. The confusion arises as a result of a state statute which provides the procedure for challenging the constitutionality or validity of voter-passed legislation.[5] There is much confusion and uncertainty within the non-

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[3] MacPherson v. Dep. of Admin. Serv., No. 00C15769 (Marion County, Or. Cir. Ct. Oct. 14, 2005).

[4] *Id.* at 23.

[5] OR. REV. STAT. § 250.044 (2005), provides:

> (1) An action that challenges the constitutionality of a measure initiated by the people or referred to the people for a vote must be commenced in the Circuit Court for Marion County if:
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> (a) The action is filed by a plaintiff asserting a claim for relief that challenges the constitutionality of a state statute or an amendment to the Oregon Constitution initiated by the people or referred to the people under section 1 (1) to (4), Article IV of the Oregon Constitution;
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> (b) The action is commenced on or after the date that the Secretary of State certifies that the challenged measure has been adopted by the electors and within 180 days after the effective date of the measure; and
>
> (c) The action may not be commenced in the Oregon Tax Court.
>
> (2) An action under subsection (1) of this section must be within the jurisdiction of circuit courts and must present a justiciable controversy. The plaintiff in an action subject to the requirements of this section must serve a copy of the complaint on the Attorney General.
>
> (3) If an action subject to the requirements of this section is filed in a court other than the Circuit Court for Marion County, the other court, on its own motion or the motion of any party to the action, shall dismiss the action or transfer the action to the Circuit Court for Marion County.
>
> (4) This section does not apply to any civil or criminal proceeding in which the constitutionality of a state statute or provision of the Oregon Constitution is challenged in a responsive pleading.
>
> (5) If a judgment in an action subject to the requirements of this section holds that a

participating public entities because, if the Measure is ultimately found valid on appeal, the 180-day time period for deciding such claims, described below, may have passed, allowing claimants to file claims in circuit courts to request costs and attorney fees.

II. THE OREGON PLANNING PROGRAM

The year 1973 was magical. It was the year Watergate and abuse of government power became ingrained in the public mind. It marked the beginning of an era of political and social reform, of government in the sunshine, and public records laws. Without this wave of optimism and reform, the Oregon legislature might not have enacted its land-use program. Senate Bill 100,[6] which encapsulated that spirit of reform, overcame fearsome difficulties and survived intense floor debate in the Senate to become the foundation of the country's leading land-use planning program. However, while the program generally remained intact, various political factions continued to disagree with each other, and, in recent years, matters became so contentious that it seemed only a matter of time before some changes were bound to happen. The passage of Measure 37 in November 2004 heralded a new era of land-use planning in Oregon. However, as the underlying structure and mechanisms of the Oregon land-use program are largely unchanged, an initial overview of that program is in order.[7]

A. Structure

In 1973, Senate Bill 100 established the Land Conservation and Development Commission (LCDC)[8] as the center of the Oregon planning

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challenged measure is invalid in whole or in part, a party to the action may appeal the judgment only by filing a notice of appeal directly with the Supreme Court within the time and in the manner specified in ORS chapter 19 for civil appeals to the Court of Appeals. Any party filing a notice of appeal under this subsection must note in the notice of appeal that the case is subject to this subsection.

(6) If a judgment in an action subject to the requirements of this section holds that a challenged measure is valid, a party to the action may appeal the judgment by filing a notice of appeal in the Court of Appeals within the time and in the manner specified in ORS chapter 19 for civil appeals. Notwithstanding ORS 19.405 (1), the party may move the Court of Appeals to certify the appeal to the Supreme Court, and the Court of Appeals acting in its sole discretion may so certify the appeal. If the Court of Appeals certifies the appeal to the Supreme Court, the Supreme Court shall accept or deny acceptance of the certification as provided in ORS 19.405 (2).

[6] S.B. 100, 57th Leg., Reg. Sess. (Or. 1973).

[7] A more comprehensive description may be found elsewhere. *See*, *e.g.*, Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813 (1998); Edward J. Sullivan, *The Legal Evolution of the Oregon Planning System*, *in* PLANNING THE OREGON WAY 49 (Carl Abbott et al. eds., 1994); Edward J. Sullivan, *Oregon Blazes a Trail*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING 51 (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

[8] *See* OR. REV. STAT. § 197.030 (2005) (establishing a seven member commission appointed by the governor subject to confirmation by the Senate).

program. Following enactment of this enabling legislation, LCDC adopted planning standards, called "goals,"[9] as well as administrative rules setting forth goal requirements in some detail.[10] LCDC then proceeded to supervise the activities of the Department of Land Conservation and Development (DLCD) in the day-to-day work of the planning program.[11]

Over its lifetime, the LCDC promulgated nineteen statewide planning goals. These goals establish binding land-use policies that attempt to strike a balance between development and conservation. The goals fall broadly into five categories: 1) the planning process, 2) citizen involvement, 3) conservation of natural resources, 4) economic development, such as housing and transportation, and 5) management of Oregon's coastal resources. Since 1973, Oregon has required that most land-use decisions by state agencies, general purpose local governments, and other local governments[12] be consistent with state policy as embodied in this framework of planning goals. As separate approval standards, the goals form an independent basis for challenging local planning actions.[13]

Senate Bill 100 required every city and county to formulate or amend its own comprehensive plan to meet the applicable planning goals. "Acknowledgement," an invention of the 1977 legislative session, is LCDC's certification that the goals are implemented through local plans and regulations.[14] By 1986, the agency had acknowledged the coordinated plans of all 276 cities and counties in the state.[15]

Importantly, the state planning goals apply to land-use decisions involving individual parcels of land until acknowledgment. Following acknowledgment, individual amendments to plans and regulations are subject to challenge on grounds of compliance with the goals.[16] Additionally, plans and land-use regulations may also be subject to a periodic review to determine continued compliance of local plans and land-use regulations with the goals.[17]

B. The Land-Use Board of Appeals

In 1979, the Oregon Legislature created the Land Use Board of Appeals (LUBA).[18] This statewide administrative panel is unique because it possesses "exclusive jurisdiction" to review most local and some state "land use

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9 *Id.* § 197.015(8).

10 *Id.* § 197.040(1)(b), (c)(A).

11 *Id.* § 197.040(1)(a).

12 *Id.* § 197.180 (state agencies); § 197.175(1) (cities and counties, the general purpose local governments of Oregon); § 197.015(19) (special districts).

13 *Id.* § 197.175(2)(c) (local governments); § 197.180(9) (state agencies).

14 *Id.* § 197.251.

15 Or. Dep. of Land Conservation and Dev., 25th Anniversary of Senate Bill 100, *available at* http://www.oregon.gov/LCD/docs/history/25thanniv.pdf. LCDC acknowledged comprehensive plans for Granite and Grant County on Aug. 7, 1986. *Id.*

16 OR. REV. STAT. §§ 197.610–.625 (2003).

17 *Id.* § 197.628.

18 S.B. 435, 60th Leg., Reg. Sess. (Or. 1979).

decisions"[19] for conformity with the statewide planning "goals," and to review amendments to acknowledged comprehensive plans and regulations. The decisions of the Board are subject to review by the appellate courts.[20] Oregon's pioneering decision to supplant the trial court system of adjudication in the land-use context was underpinned by sound policy reasons, including short decisional timelines, exclusive jurisdiction over all land-use decisions, the efficiencies resulting from strict procedural rules and the concomitant reduction of costs, the expertise that the Board has manifestly developed, and the resulting accuracy and consistency of decisions.[21] LUBA has a significant role in shaping state policy because in reviewing a challenged land-use decision, it must interpret and apply these goals.[22]

C. The Oregon Land-Use Program

Over the past thirty-two years, the basic structure of the Oregon planning program has remained largely unchanged. Nonetheless, institutions such as local governments, as well as public and private interest groups, have affected the program. It has seen vigorous participation from groups as diverse as 1000 Friends of Oregon, the Oregon Retail Council, the Oregon Association of Realtors, Oregonians in Action, the Oregon Concrete and Aggregate Producers Association, and various homebuilder groups.

Further, the tendency of the Oregon Legislature has always been to add to and "nit-pick," rather than to revise, the existing legislation in a coherent manner. Oregon's planning program, having now survived multiple governors and legislative sessions each with their own perceptions and priorities, has consequently become a work of considerable complexity.

In addition to the numerous incremental changes to the program, generational change cannot be overlooked as a factor affecting the program. In 1973, the fight for open government against the Nixon administration and the Vietnam War and concern for the environment made many political things new. The current political and social culture is now markedly different. People who move to Oregon, or who are now coming of age, simply do not remember the history and reasons for putting so much blood and treasure into the state's land-use program. Indeed, more than half of Oregon's current population was not in the state or were children when Senate Bill 100 passed. While they might know little about the rationale for urban growth boundaries, they do know they bought a lot next to some trees which are about to be taken down for another development. For too many of these people, lowering property taxes is more important than providing additional government services to their new neighbors. Autonomy in personal expenditure, a cover for self-interest, is more important than the

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19 OR. REV. STAT. § 197.015(10) (2003).

20 *Id.* § 197.850.

21 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 (2000).

22 *Id.*

needs of others. The cognitive dissonance of holding two contrary positions simultaneously has not yet occurred to them.

Even though the program has been the object of much time, study, money, and political jockeying, it is clear that the system needs an evaluation far more quantitative and penetrating than has yet been undertaken. The Oregon Chapter of the American Planning Association has long advocated such a review and, partially because of the passage of Measure 37, the legislature has authorized and funded that review.[23] The requisite evaluation is forthcoming, in the form of Senate Bill 82, which created a task force to examine Oregon's land-use system.[24] This review will likely require a conscious assessment of the stated and unstated values that underlie that system, a measure of those values against each other when they compete, and, necessarily, a decision on which values should prevail in the event of a conflict. This is a time-consuming and expensive task. In particular, the state planning program must be evaluated publicly to determine whether the vision of the 1973 legislature remains in place, whether the purposes of the program were realized, and whether the state still has the priorities it had in 1973.

While it is unlikely that Oregonians will repeal their state planning program, they appear open to blandishments, cleverly put forward through the use of anecdote, to change that program for the worse. The old orthodoxies are no longer sufficient to prevent these "quick fixes." Only a comprehensive and thoughtful review of the system will preserve what is good and provide the consensus to change what must be changed. The failed election and subsequent confused legislative response to the passage of Measure 37 illustrate the need to commence that review.

The system has so far survived three attempted eviscerations of the growth management laws in 1976, 1978, and 1982. Since the early 1990s, significant change of the program was not possible with the legislative and executive branches in a political stalemate. However, program supporters missed warning signals that the system could be undermined with the right combination of stories and words. Opponents of the planning program deftly exploited both Oregon's libertarian tendencies and its strong property rights culture, and in 2000 placed Measure 7, a constitutional amendment similar to Measure 37 (though not expressly providing for waivers), on the ballot. Measure 7 passed with fifty-three percent of the vote.[25] After it fell on the wrong side of a constitutional challenge,[26] it was only a matter of time before

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[23] S.B. 82, 73d Leg., Reg. Sess. (Or. 2005). Originally reluctant to commit nearly $1 million, the legislature ultimately passed the bill with a budget of $600,000. OREGON LEGISLATIVE FISCAL OFFICE, ANALYSIS OF THE 2005–07 LEGISLATIVELY ADOPTED BUDGET 284 (2005), *available at* http://www.leg.state.or.us/comm/lfo/05_07agb/05-07%20LAB%20Cover%20Pages.pdf.

[24] *Id.*

[25] For an enlightening article on the politics of Measure 7 and its aftermath, see C. Abbott, S. Adler & D. Howe, *A Quiet Counteroffensive in Land Use Regulation, The Origins and Impact of Oregon's Measure 7*, 14 HOUSING POL'Y DEBATE 383 (2003).

[26] League of Oregon Cities v. State, 56 P.3d 892, 911 (Or. 2002). The Oregon Supreme Court found that the Measure included several constitutional changes, in violation of the "separate vote" requirements of art. XVII, § 1 of the Oregon constitution. *Id.*

Oregonians in Action, a property rights group that had supported Measure 7, produced Measure 37 as a statutory successor.

III. THE MEASURE AND ITS IMPLICATIONS

A. Passage

Viewed alongside the overwhelming support for the State's planning program,[27] the 61% to 39% vote that secured Measure 37's passage left many confounded. In the aftermath, however, some observations can be made about the Measure's unexpected success at the polls. Opponents of the Oregon planning system were reasonably well financed and were able to get a ballot title through the process by putting up multiple possible measures, thus allowing the drafters to prepare ballot titles and wait the statutory time period to see if those ballot titles were challenged. The statutory waiting period was used to "test market" the various ballot titles before focus groups. Once a ballot title was chosen and certified, proponents were able to use a combination of their own conservative base and paid signature gatherers to get the Measure on the 2004 general election ballot. For many observers, the ballot title was the end of the story, as many voters do not read the Voters' Pamphlet.[28]

The ballot title for Initiative 36, which became Measure 37 on April 22, 2003, declared enticingly that "governments must pay owners" when certain land-use regulations reduce land values. The theme of the proponents' campaign was not anti-planning, but "fairness," considerably bolstered by emotive anecdotal inequities. Using a tactic from the national property rights movement playbook,[29] advertisements featuring ninety-four-year-old widow Dorothy English[30] gained state-wide currency. Her defiant radio statement

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[27] *See* KATIE SHRIVER, OREGON COMMUNITY FOUNDATION, UNDERSTANDING THE IMPACTS OF MEASURE 37, 12, 20–23, *available at* http://www.ocf1.org/publications_resources/documents/Measure%2037%20Report.doc (summarizing the support for the State's planning program).

[28] The draft petition title read:

> Requires Governments to Pay Owners, or Override Restrictions, When Certain Use Restrictions Reduce Property Value.
>
> Result of a "Yes" Vote: "Yes" vote requires governments to pay owners or repeal, change or not apply restrictions, when certain use restrictions reduce property value; provides no funding source.

Letter from Jeffery Adams, Oregon Assistant Attorney General, to John Lindback, Elections Division Director (Apr. 22, 2003) (on file with author). Comments from proponents of the title convinced the Attorney General to change the provision to replace the term "Override Restrictions" with "Forgo Enforcement" and to change "use restriction" to "land use restrictions." Adding the word "land" before the term "use restriction" required deletion of an additional term. Thus "provides no funding source" was deleted from the "yes" result section. *Id.*

[29] For example, *Dolan v. Tigard*, 512 U.S. 374 (1994) and *Suitum v. Tahoe Regional Planning Authority*, 520 U.S. 725 (1997), were both "widow cases" in takings law in which sympathy for the status of the plaintiff played a part in the litigation strategy.

[30] The campaign advertisements said Ms. English wanted to divide her forest land to give

that "I've always been fighting the government, and I'm not going to stop!"[31] epitomises the attitudes taken by many opponents of the Oregon planning program. Further tales of financial hardship and allegedly prejudicial limitations combined to eclipse multiple planning successes from the minds of voters.[32]

There was certainly a case to be made that masquerading behind this alluring title was a measure that would, in reality, encourage unplanned development or cost Oregon taxpayers millions, as well as discourage land-use planning and regulation state-wide. A more transparent title would have illuminated the true nature of the legislation.[33] The failure to perfect a challenge to the ballot title was a missed opportunity.[34]

B. The Measure

For the moment at least, Measure 37 is something with which Oregonians must now learn to live. The Measure creates a general statutory (as opposed to constitutional) right to government payment when a government "enacts or enforces" a "land use regulation"[35] that restricts the use of property and reduces its value. Payment is measured from the time the current owner, the owner's family member, or entity acquired the

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portions to her children but did not note that Ms. English had previously split off two portions of her property for sale.

[31] Center for the Defense of Free Enterprise, *Oregon Voters End Era of Iron-Fisted Rules Forcing Private Owners to Bear the Cost of Public Use*, http://www.cdfe.org/oregon_property_rights.htm (last visited Jan. 22, 2006).

[32] In preparing for the 2006 election, Oregonians in Action filed eleven ballot titles, nine of which amend Measure 37 to make waiver claims transferable. 1000 Friends of Oregon filed two ballot titles with the Secretary of State seeking to eviscerate Measure 37 provisions. *Second Legislature Ready to Convene, Insider Online*, Oct. 17, 2005, *available at* http://www.cfm-online.com/insider/allstories.php?issueid=237.

[33] A pertinent line of inquiry would indeed seek to elucidate the basis of the superior status accorded to land as compared with other forms of property. One may legitimately inquire as to the element of the national psyche that causes Americans to separate land from other articles of commerce and any other aspect of our daily lives that may be regulated. After all, why should the public owe to a landowner rights that it does not owe to a stockholder or businessman? *See* Edward J. Sullivan, *The Taking Issue*, 5 ENVTL. L. 515, 525 (1975) (book review).

[34] OR. REV. STAT. §§ 250.045 to 250.135 deal with statewide initiatives. These statutes require the Attorney General to prepare a ballot title for all prospective initiative petitions. OR. REV. STAT. § 250.065(3) (2003). The ballot title adopted by the Secretary of State may be challenged before the Oregon Supreme Court by "any elector" who participated in the administrative proceedings resulting in the ballot title by filing comments on the prospective ballot title. *Id.* § 250.085. That process, although relatively swift, often has the effect of taking critical time away from gathering the signatures needed to place a measure on the ballot. In this case, both the drafters and the opponents of the Measure filed comments and both attempted to seek review of the ballot title in the Oregon Supreme Court. Both challenges were dismissed because both sets of challengers failed to file for review in the manner provided by statute. *Id.* § 250.067(1). To be fair, recent experience in challenging ballot titles in that court has not been encouraging.

[35] Ballot Measure 37 § (1) (Or. 2004). While the term includes state and local planning and zoning regulations, it also specifically includes transportation ordinances and forestry regulations. *Id.* § (11)(b). The inclusion of the latter should not be surprising since timber corporations put up a good deal of the campaign funds in favor of the Measure.

property at issue.[36] The amount "due" reflects the reduction in fair market value resulting from restrictions imposed on the property since its acquisition by the current owner, calculated as of the time the Measure 37 claim is filed. The Fifth Amendment, as well as article I, section 18 of the Oregon Constitution, provide protection against "unconstitutional takings." Measure 37 allows an additional cause of action for monetary claims against public entities. By introducing a more readily invoked alternative to takings claims, Measure 37 profoundly changes the Oregon regulatory landscape.

C. Measure of Value

Valuation of land under Measure 37 is highly speculative, particularly if surrounding properties may qualify for the same or different claims. Appraisers may not know the genealogy of the families of landowners or their neighbors, nor may land-use regulations (some over seventy-years-old) be available to determine development rights. These variables are important not only in the evaluation of claims, but also for property financing purposes.

Among the many issues surrounding Measure 37 appraisals are those raised by previous government subsidies. Since 1973, the State of Oregon has invested $5.4 billion in forgiven or deferred taxes to farmers, ranchers, and timber companies to keep their lands in resource use.[37] It is unclear whether this investment may be calculated in determining an offset to amounts claimed under the Measure or whether these amounts are to be paid back upon conversion of the land to non-resource use. If the regulation were the basis for previous government payment, it would only be fair that these subsidized savings be repaid as part of the Measure 37 claim, thereby providing more public funds. It may well be argued that resource land preservation provides a public good as well as positive externalities. In a similar vein, development subsidies for infrastructure contributions might also be calculated in determining the amount of any payment. These adjustment issues have yet to be confronted by the courts.

Nevertheless, it is by no means a certainty that land-use regulations reduce market land values. In a recent insightful analysis, economist William

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[36] *Id.* § (2). The drafters of the Measure learned from the California property-tax limitation measure, Proposition 13 (1978), by which property assessment was virtually "frozen" but could be reassessed when it changed hands. This approach makes single family housing more vulnerable to increased taxes. This is because Americans change homes relatively frequently, while corporate property retained an artificially low tax rate because it almost never "changed hands," largely due to stock sales, mergers, or other transactions which did not result in a new entity taking title.

[37] Edward J. Sullivan, *Oregon's Measure 37—Crisis and Opportunity for Planning*, http://www.friends.org/issues/documents/M37/M37-Article-Ed-Sullivan.pdf (last visited Jan. 21, 2006). For example, Oregon law gives preferential assessment to land within an "exclusive farm use" zone or otherwise used for exclusive farm use purposes, so that the land is appraised for property tax purposes for its farm use, rather than its market value. *See* Edward J. Sullivan, *The Greening of the Taxpayer: The Relationship of Farm Zone Taxation in Oregon to Land Use*, 9 WILLAMETTE L. J. 1, 10 (1973).

Jaeger cautions against acceptance of this conventional wisdom. He notes that "in many cases, the primary effect of a land-use regulation may be to raise the value of lands *not* subject to the regulation, while leaving the prices of regulated lands unaffected or only marginally affected in some cases."[38] The price differential between regulated and unregulated lands may sometimes reflect only the increased value of lands not subject to the regulation and reveal nothing about whether the regulated land suffered a reduction in value.

Similarly, statistics from the Census of Agriculture clearly evidence that much farmland steadily increased in value during the period in which LCDC's goals were adopted and counties zoned or re-zoned farmland in order to comply.[39] It simply cannot be presumed that farmland has lost value because it has been zoned for exclusive farm use.

Jaeger further discusses the creation of positive "neighborhood effects."[40] Restricting landowners from actions that would increase their individual property value at the expense of their neighbors' may also increase the value of surrounding affected parcels of land. Local democracy may work best when neighbors decide to get together in a formal sense to "buy" development rights of adjacent or nearby properties. Under "home rule" authority, local governments may form assessment districts to buy rights at an appraised value so that neighbors fund a public conservation easement over the land. It is possible for the local government to issue bonds to pay for this purchase and to charge benefited properties a proportionate share, plus interest and carrying costs, to accomplish that end.[41]

However, Jaeger also highlights the sheer ineptitude of standard appraisal methods in evaluating the market effects at stake.[42] Attempts to assess the effect of *past* land-use regulations on *current* property values must take into account numerous hypothetical changes that would have occurred over time had the land-use regulation not been enacted. Such a fictional history is plainly impossible to compose with any pretense of accuracy.[43] Moreover, in determining the value of the land without the regulation, should the regulation be hypothetically removed from the parcel under consideration alone, or from all land to which the regulation applies?

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[38] William K. Jaeger, The Effects of Land Use Regulations on Land Prices, (July 12, 2005) (draft manuscript on file with author).

[39] William K. Jaeger, The Effects of Land Use Regulations on Land Prices, 36 ENVTL L.107 (2006).

[40] *Id.* at 108.

[41] Whether this mechanism is available under Oregon law is as yet untested. Another issue that may arise is the use of the power of eminent domain if a public authority does not ultimately use the property. Although *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), would authorize that power, there remains much controversy over the use of eminent domain in those cases not involving blight or where the public authority does not use the property.

[42] Jaeger, *supra* note 39, at 110–12.

[43] *See* Johan DePrez, *Risk, Uncertainty and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynsesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings*, 34 LOY. L.A. L. REV. 1221, 1242–43 (2001) (discussing how knowledge of the past is not sufficient to determine the probability of future events).

The former approach treats the landowner as a monopolist who benefits from the restrictions on surrounding parcels still subject to the regulation.[44]

Another significant flaw in the approaches presently taken by most claimants is their tendency to measure not the *loss* in value resulting from a given regulation, but the windfall *gain* that an exemption would bring them. These are very different questions.[45] Simply because land can be sold at a value of *x* under the current regulations and can be sold at the greater value of *y* once the regulations change, it does not necessarily follow that the land lost value at the time the regulation was imposed. Rather, it means that without the regulation, the claimant receives a windfall gain that may bear no connection to the actual land value.

D. Waiver

Compounding these issues, a consistent theme through the administrations and legislative sessions of the past quarter century has been the lack of funds available for local governments to perform the planning and regulatory duties imposed by Oregon's planning laws. The impact of payment to Measure 37 claimants under the vision of some proponents of the Measure may be monumental, with many claims asserted to reach well into seven figures. From across the Columbia River, a commentator notes:

> Although the language of Measure 37 states "governments shall pay," in reality this means "taxpayers shall pay." In view of the scarcity of tax dollars for needed roads, parks, police, firefighters and libraries, laws such as Measure 37 present communities with a Hobson's choice. As is playing out now in Oregon, cash-strapped local governments typically waive enforcement of regulations against claimants—regulations that would continue to apply to everyone else.[46]

In his comprehensive work, *Windfalls for Wipeouts*, the late Professor Donald Hagman, along with Dean Miscynski, suggested that perceived inequities in the application of land-use regulations be mutually offset by a system of government payments for those "wiped out" by such regulations,

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[44] Andrew J. Plantinga, *Measuring Compensation Under Measure 37: An Economist's Perspective* 9–11 (Dec. 9, 2004), *available at* http://arec.oregonstate.edu/faculty2/measure37.pdf. Plantinga considers the possibility of basing compensation on the original purchase price. *Id.* at 10. While this has the advantage of utilizing values which are often readily observable, it can be impossible to know whether the market had in fact anticipated the eventual enactment of the regulation, and thus already accounted for it in the purchase price. Moreover, sales prices are frequently agreed for a collection of assets, rendering the price of a particular parcel of land unknown.

The author goes on to suggest that valuation based on the original purchase price is easier. Aside from the fact that the market may or may not have anticipated future regulation, the purchase price paid is often for a collection of assets, so that the amount paid for the affected land cannot be determined. *Id.* at 13.

[45] *See generally* Jaeger, *supra* note 39; Plantinga, *supra*, note 44.

[46] Joseph W. Tovar, Editorial, *Washington Must Resist the Lure of Measure 37*, THE SEATTLE TIMES, May 29, 2005, *available at* http://seattletimes.nwsource.com/html/opinion/2002291263_tovar29.html?syndication=rss.

funded in large part by the windfalls accruing to those who benefited by the same.[47] While this method is better accomplished on a state-wide basis, its establishment and use at the regional or local level, where "home rule" applies, provides a means by which development rights may be appraised and purchased.[48]

Nevertheless, the real import of the Measure seems to be in the alternative to payment: waiver of the offending regulations. In contrast to monetary payment, a waiver applies only so as to allow the present owner to carry out a use of the property which was permitted at the time that owner acquired the property.[49] This distinction appears to have been intentionally included to secure the Measure's passage.

Indeed, contrary to the phrasing of the Measure's title, waiver of regulations appears to be the only real option. The LCDC has, by rule, directed that if the state determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.[50] The amount of lost value may very well be minimal. Nevertheless, there is an inability to pay. The decisions of DLCD repeatedly state that "without an appraisal, or other explanation, based on the value of a dwelling on the subject property, it is not possible to substantiate the specific dollar amount the claimant's demand for compensation."[51] In reality, a claimant need only establish on the *balance of probabilities* that there has been *some* reduction in the fair market value of the subject property in order to obtain a waiver.[52] The State of Oregon does not require that a claimant produce any actual evidence of a reduction in fair market value resulting from enactment or enforcement of a land-use regulation, notwithstanding the requirements of the Measure to the contrary.

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47 MADELYN GLICKFELD ET AL., WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (Donald G. Hagman & Dean J. Misczynski, eds., 1978); Sullivan, *supra* note 33, at 15.

48 Sullivan, *supra* note 33, at 16. Tax increment financing allows urban renewal entities to "self-fund" land acquisition and major public works projects by "freezing" property taxes within the urban renewal area for purposes of the assessment and collection of property taxes for the taxing entities as a whole. Full property taxes, however, are collected within the urban renewal area and the difference is placed in a fund to pay for the land acquisition and public works projects. This means of providing payment for land acquisition might be used by those willing to pay for the viability of their immediate surroundings. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Supreme Court upheld a similar measure to redistribute land ownership in Hawaii by condemning land and then selling it to the current occupants. The Supreme Court found that this was a "public use" for the purposes of the takings clause, suggesting a very broad view of what constitutes "public use." *Id.* at 244.

49 As the rollback timeline is relatively short for natural persons (as opposed to other entities), the tendency to waive, rather than pay, is greater. This result is based on regulations applicable when the first family member acquired the property, compared with an even greater period for non-natural entities, because the payment due under the Measure is likely to be greater as the result of a longer holding period.

50 OR. ADMIN. R. 660-002-0010(8)(c) (2005).

51 Dept. of Land Conservation and Development, Final Staff Report and Recommendation, Arnold & Betty Beaudry, Claim No. M118373 (Oct. 19, 2005), *available at* http://www.oregon.gov/LCD–docs/ measure37/finalreports/M118373_Beaudry_final.pdf.

52 Ballot Measure 37 § (1) (Or. 2004).

No government obligation to respond arises until a claimant files a claim. While the Measure allows governments to establish claim procedures, section 7 specifically states that such procedures shall not constitute prerequisites for making a claim to a court.[53] One immediate controversy is whether local governments may exact additional documentation detailing the claim. These details may include whether the current owner can provide the identity of claimed family members, the identity of the regulation that forms the basis of the claim, and the amount of the claim. In response to the administrative burdens imposed by the Measure, many local governments enacted requirements that claimants submit documentation to support a claim. It remains unclear, however, whether those requirements are enforceable. Thus, it falls to overburdened planning staff to research and document the history of the claimant's property and other claim-related issues. Moreover, if a previous owner reacquires the property, then she may be able to act as if the property had been in his family all along.

Further, as evaluation of a claim takes unbudgeted time and money that were not budgeted, public entities contend that the burden should be on the claimant to justify a claim and to pay the processing costs. Measure 37 also has a one-sided attorney fee provision—if a court rules that a public entity improperly denied a claim, the claimant is entitled to attorney fees.[54] However, if the entity successfully defends against a claim, it is not so entitled. The risk of exposure to huge fee awards often intimidates those entities into erring of the side of waiver, even if there are doubts as to the claim's validity, particularly if the claimant refuses to provide justification for the claim.

It is also unclear whether local governments may exact a covenant or other enforceable agreement by which, in return for payment, the property owner agrees to keep then current regulations in place. Alternatively, in the case of waiver, may the public entity require that the property owner keep in place those regulations current at the time of the owner's acquisition? May such an agreement be changed thereafter? If so, what criteria should apply?

E. Exceptions

Section 3 of the Measure lists several exceptions to the "pay or waive" scheme, seemingly designed to avoid the "parade of horribles" proponents feared during the campaign:

(A) The first exemption relates to regulations restricting or prohibiting common law public nuisances.[55] The provision has little substance as public nuisances are difficult to prove and subject to equitable defenses, and the exception explicitly demands narrow construction.

(B) Regulations restricting or prohibiting activities for the protection of

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[53] *Id.* § (7).

[54] *Id.* § (6).

[55] *Id.* § (3)(A) ("Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act.").

"public health and safety" are exempted.[56] Although little guidance is given as to the meaning of these terms, the omission of "welfare" from the familiar triad is noteworthy. The specific inclusion of "pollution control" rules as a type of health and safety regulation may warrant narrow construction of the exemption, excluding other kinds of environmental regulations.

(C) Land-use regulation is allowed to the extent necessary to comply with federal law.[57] It is not often that the federal government requires state and local governments to enact specific provisions. Rather, it generally allows those governments to choose the means of complying with federal programs, such as regulation of air and water quality sources, coastal zone mandates, and the like. Whether these constitute "requirements" for Measure 37 remains to be seen. The Endangered Species Act,[58] for example, does not require anything specific—only a process. The Highway Beautification Act[59] provides for withholding federal funds for certain forms of non-compliance. The constellation of these requirements may leave public entities with the difficult choice of payment to landowners and loss of federal funds or the risk of federal enforcement. One recent example of the use of this exception appears to be the Columbia River Gorge Commission's authority in the bi-state scenic area, which was upheld in a recent trial court opinion.[60]

(D) The exception for regulations restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing is incoherent.[61] If there is a constitutional problem (as is likely under the Oregon Constitution) with paying some people not to use their property and not paying those who choose their property for otherwise lawful free expression, then there is no exception.[62] The exception is also under-

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[56] *Id.* § (3)(B) ("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.").

[57] *Id.* § (3)(C) ("To the extent the land use regulation is required to comply with federal law.").

[58] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

[59] Highway Beautification Act of 1965, 23 U.S.C. §§ 131, 136, 319 (2000) (establishing authority of the Columbia River Gorge Commission).

[60] *See* Columbia River Gorge National Scenic Act, Pub. L. 99-663; OR. REV. STAT. §§ 197.105–197.165 (2003) (establishing the Commission). *See* Columbia River Gorge Comm'n v. Hood River County, Multnomah County, Wasco County, No. 050051 CC, slip op. at 2 (Hood River County, Or. Cir. Ct. Aug. 1, 2005) (holding that Measure 37 does not apply to land-use regulations enacted or enforced by Hood River County, Multnomah County, and Wasco County to implement the Columbia River Gorge National Scenic Area Act, the Columbia River Gorge Compact, or the Management Plan adopted by the Columbia River Gorge Commission). The court stated that this was because those land-use regulations are "required to comply with federal law" as that phrase is used in the exemption contained in section 3(C). *Id.*

[61] Ballot Measure 37 § (3)(D) ("Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions.").

[62] This is most certainly the case considering the Oregon Supreme Court's ruling in *State v. Ciancanelli*, 121 P.3d 613 (Or. 2005). This case held that a prohibition against promoting live sex shows does not fall within the historical exception and is therefore a violation of article 1, section 8 as it is not directed at preventing harm to individuals but rather at protecting the

inclusive, as the first claim for foregoing lingerie modelling will likely demonstrate.

(E) The only sure-fire exception revolves around when the person (or family member) or entity acquired the property. Regulations enacted prior to the date of acquisition are exempted.[63] Genealogy tables and corporate papers dealing with renaming or reorganization, as well as applicable zoning regulations, will all come into play when evaluating possible claims.

These exceptions are replete with ambiguities. Public entities must either guess right or suffer an assessment of attorney fees and costs. The very vagueness of the Measure, which causes public entities to be cautious, will also cause those involved in real estate and development to abjure responsibility for transactions involving the Measure.[64]

F. Difficulties

Many practical difficulties have accompanied the new measure's implementation. One glaring omission, that may have been deliberate, is that of an effective statute of limitations period. Consequently, a claim may be brought at any time.[65] Moreover, a decision to pay or waive is not a "land use decision" subject to review by the Land Use Board of Appeals.[66]

Whether those regulations in effect when the present owner acquired the property come back to life in the absence of changing or repealing current regulations has not been decided. Either way, the public will be receiving confusing messages.

In addition to this confusion, the Measure defines "family member" relatively comprehensively but notably excludes unmarried partners.[67] In any event, transfers to a spouse for tax purposes have already been found to invalidate claims, falling afoul of the "present owner" requirement.

Transferability is a key issue and the subject of strongly held, but

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viewer from hearing the message. *Id.* at 635.

[63] Ballot Measure 37 § (3)(E) ("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.").

[64] The Portland Association of Realtors advised its members to tell clients that they should receive competent advice from other professionals and not to give advice themselves. Wendy Culverwell, *Measure 37 Creates Realtor headaches: Seek Legal Help Before Signing the Deal*, PORTLAND BUSINESS JOURNAL, (Jan. 14, 2005), *available at* http://www.bizjournals.com/portland/stories/2005/01/17/story2.html.

[65] Whether there is any period of repose is one of the questions that must await resolution by litigation. If no specific statute applies, OR. REV. STAT. § 12.140 establishes a default 10-year statute of limitations.

[66] Ballot Measure 37 § (9). *See also* OR. REV. STAT. §§ 197.805–197.855 (2003) (creating the Land Use Board of Appeals to resolve land-use disputes efficiently and fairly).

[67] Ballot Measure 37 § (11). Oregon does not recognize common-law marriage. Walker v. Hildenbrand, 410 P.2d 244, 245 (Or. 1966). Oregon courts, however, have granted worker's compensation benefits to a child of a cohabiting couple. Hewitt v. SAIF, 653 P.2d 970, 982 (Or. 1982). Moreover, Oregon courts have found a right for same-sex couples to claim benefits as would married couples. *See generally* Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 448 (Or. Ct. App. 1998).

diametrically opposed, opinions. The Oregon Attorney General has expressed the opinion that, as the Measure suggests, a waiver is personal to the present owner of the property, and does not run with the land.[68] Thus, the owner may not transfer the land to another for development, and may consequently encounter chronic financing difficulties. If the owner develops the property himself, the most he can transfer to others is a nonconforming use, which has its own set of problems under Oregon law.[69] One way to deal with this is for a pre-existing owner to have a continuing minimal property interest in the land. This is easily accomplished by using two corporate entities that may, by agreement, allocate shares in a joint venture.[70]

Further difficulties may arise in determining the content of applicable regulations. Planning law in Oregon dates back to the early 1920s and has both a state and a regional/local element.[71] Before 1969, cities, and many counties, adopted most land-use regulations through their home rule powers. Thus, those regulations must be researched. Beginning in 1955, subdivision and street access regulations were required.[72] But in 1969, the legislature required cities and counties to adopt both plans and zoning regulations and to use certain statutory considerations in doing so, considerations which were not replaced until the statewide planning goals were enacted in 1974–75.[73] The scope and content of these considerations were untested. So too, the statewide planning goals were applied for many years without a definitive interpretation by the courts and, consequently, initial applications may have been different than later definitive interpretations. The "definitive" interpretation relates back to the date of the adoption of the goal or regulation and is not "new" but, rather, is the view of the interpreter as to what the language of the regulation said all along. There are also manifest difficulties in establishing which county regulations were in effect upon a specific date; older regulations are not often readily available. These matters will keep lawyers busy for many years to come.

Unanswered questions abound. For instance, because many of the regulations targeted by the authors of Measure 37 are state-mandated,[74] two claims must be filed—one with the state and one with the local government

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[68] Letter from Hardy Myers, Oregon Attorney General, to Lane Shetterly, director of DLCD (Feb. 24, 2005) (on file with author).

[69] *Id.*

[70] Kenneth Sherman, Jr., *Who Moved My Cheese and the Dairy Along with it? The Hidden Perils of Measure 37*, BANKERS' ADVOCATE, Jan.–Feb. 2005, at 11, 11–12 (summarizing the potential difficulties of tranferability between non-corporate entities).

[71] Cities have had the power to adopt land-use regulations since 1919, while counties have had that power since 1947. OR. REV. STAT. § 197.274 (2003) requires the Portland regional government, Metro, to adopt a regional framework plan that is consistent with the statewide planning goals.

[72] 1955 Or. Laws 1119–20.

[73] The date of the enactments of the first fourteen goals is January, 25, 1975, when they were filed in the office of the Secretary of State as administrative rules. *See* OR. REV. STAT. § 183.355 (2003) (describing that rules do not become effective until filed with the Secretary of State).

[74] For example, minimum lot size or use regulations in farm and forest zones or natural resource protections in areas around such resources have both a state and a local analogue.

having jurisdiction. A waiver of the state regulation does not necessarily equate to a waiver of the analogous local regulation and vice-versa.[75] A related issue concerns the level of government which has authority to waive a given restriction. The Measure says that only a "governing body" may grant waivers; however, in the case of a statute, it is only the legislature that has that authority. In the case of a state agency, is the agency or the legislature the "governing body" when it is the agency that is carrying out through administrative rulemaking a broadly stated legislative policy for preservation of the environment or open space? These matters are in vital need of legislative clarification.

IV. FIRST LEGISLATIVE AND JUDICIAL RESPONSES

The lessons learned by Oregon in the adoption and aftermath of Measure 37 will be significant and may well inform planning efforts in other states.[76] Unfortunately, with the significant exception of the trial court success in *MacPherson v. Department of Administrative Services*,[77] the response by Oregon's planning and environmental communities to the passage of Measure 37 has been less than useful. Living in righteous denial of the changed political landscape following passage of the Measure, and discussing the future primarily with those like-minded, these communities wound up no better at the end of the 2005 legislative session than at the time of the passage of the Measure. In addition, they lost precious time in meeting the difficulties caused by the Measure. Portions of these communities were deliberately excluded from groups attempting to craft a compromise, and then responded by opposing that compromise, deeming it (incorrectly) "worse than 37."[78] All hope was lost when Oregonians in Action, the group behind the Measure, ultimately opposed any change to the status quo.[79]

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[75] The injunction against receipt and processing of claims in the *MacPherson* case has effectively halted completion of most Measure 37 claims, because most claims involve *both* local land-use regulations and state statutes, goals, and rules that mandate many of the local land-use regulations. As of October 28, 2005, when the Marion County Circuit Court halted the receipt and processing of Measure 37 claims, there were 1264 claims filed against the State of Oregon. Of the claims decided, DLCD granted 317 claims, denied 32, and granted and denied 10 parts of multiple claims.

[76] Similar legislation is already in the pipeline in a number of states. *See, e.g.*, David Ammons, *Eyman Eyes Property Rights*, THE NEWS TRIBUNE, June 30, 2005, *available at* http://www.thenewstribune.com/news/local/v-printer/story/4987969p-4556171c.html; Napa Valley Land Stewards Alliance, Fair Pay for Public Benefit Act, http://www.landstewards.org/fairpayment/initiative.htm (last visited Jan. 22, 2006) (an initiative currently being circulated in Napa County, California); S.B. 05-177, 65th Gen. Assem., 1st Reg. Sess. (Colo. 2005), *available at* http://www.leg.state.co.us/clics2005a/csl.nsf/fsbillcont3/EAE194A7670DBA2187256F7E0077DB08?open&file=177_01.pdf (proposing remedies for owners of real property aversely affected by land-use regulation).

[77] No. 05C10444 (Marion County, Or. Cir. Ct. Oct. 14, 2005).

[78] Press Release by Kendra Kimbirauskas, Communications Director for the Oregon Conservation Network, Oregon Conservation Network, Oregon Senate Sends Appalling Land Use Bill to Rules Committee, http://www.olcv.org/pressroom/pressreleases/landusebacktorules (last visited Jan. 22, 2006).

[79] In speaking about whether he would support a bill if transferability were included, Dave

The *MacPherson* case, a facial challenge,[80] filed by a public interest advocacy group, only pitted 1000 Friends of Oregon, an environmental organization, against the State of Oregon—entities that could have instead expended their resources cooperating in the formulation of a response to the Measure. The initial success of the challenge has, at least for the time being, mitigated the effects of the Measure as to the State and those counties participating in the case. As indicated above, however, the effect of the trial court's judgment on nonparticipating public bodies is not clear.

Because the Measure gave state or local governments 180 days to respond to the first claims made,[81] there was a brief window of time to formulate a response. That window, however, closed on the first claims in early June 2005. Claims numbered over two-thousand as of September 2005, with over $1.4 million demanded as "compensation."[82] As the judicial response to Measure 37 was not likely to bear fruit by the end of the 180-day period, all eyes turned to the Oregon Legislature, which met about six weeks after the Measure went into effect.

A. SENATE BILL 1037

In mid-May 2005, Senate Bill 1037[83] emerged from the Senate Environment and Land Use Committee. This was a comprehensive bill grappling with Measure 37, skewed toward the conservation side by precluding all claims on high value farmland, barring most claims within urban growth boundaries, and severely limiting those claims in the vicinity of urban growth boundaries and forest lands.[84] The bill further provided a process for these claims and established a valuation methodology.[85] The essential trade-off for increased protection was an allowance for heavier development on some non-high-value and "secondary" land. Bowing to various political realities, the bill recognized the "pay or waive" provisions of Measure 37,[86] allowed some limited development on non-high-value and non-resource lands, and established the right to build one single family dwelling

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Hunnicutt, director of Oregonians in Action, stated, "I'm absolutely fine if nothing happens." Peter Wong, *House Approves Development-rights Transfer*, STATESMAN JOURNAL Aug. 3, 2005, *available at* http://159.54.226.83/apps/pbcs.dll/article?AID=/20050803/STATE/508030324/1042.

[80] On January 14, 2005, the declaratory judgment action in *MacPherson v. Department of Administrative Services* was filed to invalidate Measure 37 facially on various state and federal constitutional grounds. There is a comparative rarity of constitutional challenges to the program generally. In contrast, the relative abundance of litigation in the field of procedures reflects concerns about the fairness and workability of the system. Edward Sullivan, *Land Use and the Oregon Supreme Court: A Recent Retrospective*, 25 WILLAMETTE L. REV. 259, 292 (1989).

[81] Ballot Measure 37 § (4) (Or. 2004).

[82] All current Measure 37 claims are posted at the Oregon Department of Administrative Services, Risk Management Division, Measure 37 Claims Registry, *available at* http://www.oregon.gov/DAS/Risk/docs/RegistryReport.pdf.

[83] S.B. 1037, 73d Leg. Assem., Reg. Sess. (Or. 2005).

[84] *Id.*

[85] *Id.*

[86] *Id.*

on land that had been off-limits to that use previously.[87]

Senate Bill 1037 would have instituted a number of important changes and clarifications to Measure 37. First, the bill established a valuation process. The bill would have required landowners to demonstrate that the challenged legislation reduced the fair market value by more than ten percent, highlighting the need for a claims threshold.[88] Claims for payment arising from regulations enacted prior to the effective date of the Measure would also have had a welcome (to local governments at least) sixty-day limitation period imposed.[89] Moreover, the absence of a statute of limitations would have allowed claims to be raised anytime on regulations existing as of December 2, 2004, as well as subsequently adopted regulations.[90]

The issue of authority to waive legislation would have been the subject of dearly needed clarification, the bill having been poised to establish that "a public entity . . . may modify, remove or not apply land-use regulations enacted or adopted by the public entity."[91] A fairly convincing argument can be made that only the Oregon Legislature can waive statutory requirements, so that an administrative agency is not entitled to do so. As it is, these entities (as well as claimants) are left in an unfathomable quandary. The legislation also laid out a detailed claims process and guidelines for judicial review.[92] Review of the denial of waiver would be limited to the record, thus preventing claimants from "lying in the weeds" by failing or refusing to provide documentation for claims at the pre-court level, one of the major shortcomings of Measure 37.[93] However, due to legislative inaction, these issues must now be worked out afresh at litigants' expense.

The direction of the legislature—apparent early in the negotiations—aimed towards a compromise based on incremental changes to existing legislation. The conservation community, some of whom were not permitted to participate in legislatively-sponsored negotiations, expended several precious weeks in a futile attempt to persuade legislators and interest groups to adopt a novel compensation-only scheme using transferable development credits. When this quixotic effort failed, much of that community resolved to oppose the bill as being "worse than Measure 37" (while letting on that the fight was really over the trading stock to be used in negotiations with the House). As a result, the Senate Democrats were split and the bill was left to die.[94] Despite being pared down to the bone by the

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87 *Id.*

88 *Id.* Texas and Florida have such thresholds. *See* TEX. GOVT. CODE, §§ 2007.001–2007.045 (Vernon 2005); FLA. STATS. ANN. § 70.001 (2005).

89 S.B. 1037, 73d Leg. Assem., Reg. Sess. (Or. 2005).

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 It may well be that the proponents of the Measure are as aware of its flaws as opponents and are willing to use the Measure as "trading stock" for more realistic ends. These possible trades include lifting some regulations outside of urban growth boundaries in exchange for the *status quo ante* for lands within those boundaries. It is a dangerous game and, if the implications of the Measure peak before this tradeoff is accomplished, the Measure, as well as

Rules Committee, the bill remained unpalatable to the Senate on account of the added clause permitting transferability. Further intervention by the Governor to bridge the divide failed to materialize. Indeed, throughout the course of the legislative discussions and negotiations, the Governor's Office did comparatively little, save for a statement near the end of the session agreeing to capitulate on transferability in exchange for a claims process.[95] By that time, no one was listening.

B. House Bill 3474

House Bill 3474[96] would have exempted right-to-farm protections and state-imposed plant and animal quarantines from Measure 37 landowner-rights claims, but 3474 struck the same brick wall as the Senate Bill. After having approved the provisions amending the House Bill in the Senate, Oregonians in Action asked House Republican leaders to kill the provisions when it returned to the House, in retaliation for Senate inaction on Senate Bill 1037. Thus, House Bill 3474 died a similar death.

The legislature departed Salem on August 4, 2005, neither reforming, nor clarifying Measure 37, while the facial challenge continued in the trial court. Those counties which faced the greatest number and impact of Measure 37 claims, not enamored of the state land-use program in any event, and having neither the money nor the stomach to resist claims, waived land-use regulations even before the passage of the initial 180-day period.[97] They have done so without much fear of contradiction or litigation from the State or conservationists who are too busy with the hoped-for "silver bullet" of invalidation of the Measure on its face or through the legislative process. Moreover, many have already caved to demands from claimants for the largest possible amount of development of their land, even though Measure 37 can be read to require a public entity to select only "a use" that will substitute for monetary compensation for the loss in value.[98] Thus restrictions on poster-child Dorothy English's land were eventually waived, to the horror of locals who must now stand back and watch development

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the credibility of its proponents, may suffer irreversible loss.

[95] Associated Press, *Kulongoski Compromises on Measure 37* (July 30, 2005), http://www.kgw.com/sharedcontent/APStories/stories/D8BLV8BO1.html (last visited Jan. 22, 2006).

[96] H.B. 3474, 73d Assem., Reg. Sess. (Or. 2005).

[97] *See generally* Ed Sullivan, Paths Not Taken: Oregon's Response to Measure 37, http://law.wustl.edu/landuselaw/Statutes/OR_M37_Sullivan.htm (last visited Jan. 22, 2006) (explaining the effect of Measure 37 on communities).

[98] Ballot Measure 37 § (8) (Or. 2004), provides:

> Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove or not to 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). Opponents argued that only a single use permitted at the time the current owner acquired the property could be permitted. No court has dealt with that argument.

begin on nineteen acres of hitherto undeveloped land near Portland's Forest Park.

What the state failed to do in the courts was to emulate past successes of strategic litigation. By choosing which individual Measure 37 claims it could and should resist, it could set the best precedents possible to deal with the Measure and determine its contours. Similarly, conservationist organizations expended their resources in bringing a high-profile facial challenge and pursuing a legislative strategy that has no immediate prospect of success, instead of selecting specific waivers to challenge—cases that were both egregious in terms of claims, and winnable. Moreover, those organizations might have stood up for those adversely affected by Measure 37 claims to assure that those persons would be heard as the claims were processed, and that adequate judicial review was assured.

When the 2005 Oregon Legislature drew to a close, planners and environmentalists were in no better position legally or politically than they were on December 2, 2004. In fact, because the 180-day clock is running on many new claims, that position is likely to worsen. It is among the worst kept secrets in the state that the backers of Measure 37 counseled timber companies, industrial property owners, and others with particularly egregious claims to refrain from filing them during the legislative session. Those claims will now come forward, and state and local governments are left with pitifully scant protection with which to soften the blow.[99]

V. COPING: OTHER LEGISLATIVE AND JUDICIAL ALTERNATIVES

A. Legislation and Rulemaking

No state legislation is likely to emerge until at least the 2007 regular session. The facial challenge may succeed in the Oregon Supreme Court. But in the immediate future, the uncertainties inherent in Measure 37 will provide applicants leverage when negotiating conditions of approval of a development application or the waiver of regulations posing potential obstacles to development proposals.

In addition to challenges to improper grants of payments or waivers,[100] regional and home rule local governments have enacted regulations on matters of local concern to create a private right of action for third parties (e.g., neighbors) for damages to property brought on by the grant of a waiver.[101] There is conflicting authority in the area, with an existing statute

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[99] *See generally* Sullivan, *supra* note 97 (showing the negative financial impact of Measure 37 on local and state governments).

[100] In Oregon, these grants by local governments may be tested by Writ of Review, a statutory form of common-law certiorari, which reviews local or regional actions for, *inter alia*, legal correctness, proper procedure, and substantial evidence in the whole record. OR. REV. STAT. §§ 34.010, 34.040 (2003). For the state, such grants may be tested as an order in other than a contested case. In either case, the challenge would be brought in the circuit (trial) court with appellate review. *Id.* § 34.100.

[101] *See, e.g.*, MULTNOMAH COUNTY ORDINANCE 1055 § 7.555 (Dec. 2, 2004), *available at*

stating that planning is a matter of statewide concern,[102] but there is case law holding that local governments may create private rights of action.[103]

Some valuable flexibility remains in terms of determining the coverage of Measure 37. Because the legislation speaks to the "use" of land, a number of local governments may declare that land division regulations, which do not determine land-use, are outside the scope of the Measure.[104] Some public entities require application of these regulations because no evidence exists that they reduce the value of property. Indeed, such regulations may actually increase that value. However, there has been a distinct reluctance to launch claims which engage this thorny issue, with no one wishing to be the losing litigant. It will be necessary to have a third party take up subdivision waivers in order to establish their ineligibility. It is also likely that other regulations, now found within zoning or land development regulations, will be placed elsewhere in local codes. These regulations may include design review, tree cutting, sign control, and the like.

Furthermore, because Measure 37 speaks to regulations "enacted or enforced," one may expect to see more care in the characterization of regulations in the future.[105] For existing regulations, public entities may require a landowner to show a regulation was enforced by filing and ultimate determination of an application. In those cases, however, a denial may not necessarily be based on the targeted regulation, and the process may winnow away some claims.

Decisions involving payment or waiver do not require notice or hearing under the Measure. For both political and legal reasons, however, many local governments have adopted ordinances requiring both. Notice and hearing avoids the inevitable shock when a neighboring landowner discovers a waiver only once the bulldozers arrive. Moreover, there may be a more reasoned decision, both initially and if challenged, in view of all the facts, when a hearing is held. On the other hand, such hearings may become occasion for frustration, as fiscal considerations often militate towards approval of even marginal claims and payment is not a real option. It is conceivable that the hearing may even generate further claims. Even after a waiver is granted, the previous land-use regulations continue to apply to "non-waived" property, if only in a patchwork fashion.

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http://www.co.multnomah.or.us/dbcs/LUT/land-use/Measure37/ch7-revised.pdf (providing a private right of action when waiving land-use regulations results in a decrease of adjacent property values).

102 OR. REV. STAT. § 197.013 (2003).

103 *See, e.g.*, Sims v. Besaw's Cafe, 997 P.2d 201, 211 (Or. Ct. App. 2000) (relating to employment discrimination on the basis of sexual orientation, which was not the subject of any statewide legislation).

104 Under S.B. 1037, partition, subdivision, and improvement of real property pursuant to a decision by a public entity to remove, modify, or not apply a land-use regulation or regulations shall comply with the applicable provisions of OR. REV. STAT., chapter 92, and §§ 215.402–215.438 or 227.160–227.186. S.B. 1037(11), 73d Leg. Assem., Reg. Sess. (Or. 2005).

105 For example, newer regulations are more likely to reflect connections with federal requirements or health and safety matters to avoid application of the Measure. *See* Ballot Measure 37 §§ (3)(B)–(C) (Or. 2004) (providing certain exemptions from the Measure).

Even if otherwise haphazard and destructive, claims should at least be coordinated. Although Measure 37 does not require any central repository of claims, the State of Oregon has provided for such a repository by temporary administrative rule,[106] made permanent in early 2005. Regional and local governments may be required to coordinate claims by the same statute or administrative regulation. The coordination of information on claims is important to ensure that one level of government knows what the other level is doing, especially to avoid double payments and to track which regulations are proposed to be waived for which property.

B. Strategic Litigation

With so many questions unanswered as to the scope of the Measure, public entities and planning organizations are at last considering some "test cases" to determine its contours. It is likely they will proceed either by writ of review or declaratory judgment proceedings before a claim is decided, or by collateral proceedings to challenge a payment or waiver. In that way, the government entity need not be concerned over payment of attorney fees. Meanwhile, some insight into the approach of various entities to certain issues can be gleaned from their experiences of claims so far.

1. Living Trust

An interesting revelation is that a living trust conveyance may restart the clock for measuring the effectiveness of regulations. The position of DLCD (after consulting the Department of Justice) is that transferring property to a revocable trust where the claimant is the settlor/trustor does not create a new owner.[107] However, estate planning lawyers remain divided on both issues, as do individual counties. The "chain of title" approach, under which the living trust would become the present owner, seems logically correct; thus, it seems right that transfer to any trust ought to reset the date of ownership. This is just one of many issues on which lawyers must exercise the utmost vigilance in order to avoid malpractice liability.[108] Another important future issue will be the effect of a transfer of title to a trust, especially if controlled by the former landowner.[109]

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106 OR. ADMIN. R. 125-045-0010–0110 (2005).

107 Final Order, Dep't Admin. Servs., Dep't Land Conservation and Dev., M120347 (Sept. 21, 2005), *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M120347_Hart_Final_Order.pdf.

108 *See* Jay Richardson, *Measure 37 and Estate Planning and Administration*, 95 IN BRIEF (Oregon State Bar, Professional Liability Fund, Lake Oswego, OR, June 2005), at 1–3 (describing malpractice issues related to Measure 37).

109 According to Multnomah County, the date of transfer to any trust will reset the date of ownership. Memorandum from Kelly Hansen to Chris Crean, Assistant Attorney, Multnomah County 2 (Oct. 5, 2005) (on file with author). Transfers to revocable living trusts have been upheld in some counties. *See supra* note 107, at 1 (finding transfer to revocable living trust did not create a new owner).

2. Reservation of Future Claims

The Measure provides few clues as to whether a claimant may reserve future claims, or amend or supplement the same after disposition of the current claims. Although DLCD seems content to accept that nothing in the text of the Measure prohibits reservation, efficiency and certainty militate in the opposite direction. It would be a wise idea if, at some point, a claim must be set in stone such that all regulations that impact a property's intended use are listed. The county can then determine the impact on the property value with finality. However, until a specific development plan exists for a property, knowing which regulations apply is difficult.

3. Exemptions

The DLCD appears to be routinely approving many claims conditionally, only to the extent the restrictions at issue are not exempt under section 3. However, nobody seems to know whether the laws in the claim are truly exempt, because neither the Measure nor DLCD require much specificity to begin with.[110] DLCD appears to allow for sweeping statements of which laws and rules may affect property values. The ending of every staff report with "to the extent that federal law does not apply" reinforces the idea the DLCD takes a rather general approach. Nothing is resolved at this point, however. In contrast to this approach, some public entities appear to be taking a harder line on claims and requiring specifics.

The public health and safety exemption appears to be the only exemption being regularly used, and considerable weight seems to be given to the stated purpose of the subject regulation. Consequently, regulations are retained with minimal scrutiny. Public entities have never applied the exceptions for pornography or for nuisance. The date of an owner's acquisition of property, except perhaps in the case of a living trust, may be dispositive.

It is difficult to determine what sorts of land-use regulations may be implicated or required by various federal laws. Thus the federal law exemption appears mostly theoretical at this point, with most denied claims exempted by state health and safety laws. It is possible the federal law exemption will be more applicable to specific ordinances at the local level (i.e., regarding water quality or local permitting such as building prohibitions on mapped FEMA floodplains) than those at the broader state level. The only federal law exemption currently upheld is the Columbia River Gorge Act.[111] Although some claims have been denied by applying this exemption, the appeals process is yet to come.

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110 For example, a claimant may simply request payment for, or waiver of, all land-use regulations enacted after she or a family member came into possession of the property. She is not required to present a specific development proposal or differentiate among applicable land-use regulations. That waiver may be combined with the absence of any documentation on the planning or title history of the property.

111 Columbia River Gorge Comm'n v. Hood River County, No. 050051 CC, slip op. at 2 (Hood River County, Or. Cir. Ct. Aug. 1, 2005).

Some points of reference are gradually being established. For example, a recent DLCD order concluded that "to the extent that there are restrictions on the use of . . . property in [a] floodplain and these restrictions implement Statewide Planning Goal 7 . . . such restrictions are exempt under Ballot Measure 37, Section 3(B) . . . ."[112]

C. Valuation

The measure of valuation to determine the appropriate amount of payment is one of the principal areas for strategic litigation. Section 2 requires payment to be calculated as "equal to the reduction of fair market value" of the property interest "resulting from enactment or enforcement of the land-use regulation as of the date the owner makes written demand" for payment.[113] These words provide a starting point—"fair market value" and a starting date—but do not establish other terms of the calculus—including the comparison date for the first application of non-exempt regulations for use in measuring reduction of fair market value.

Measuring past value is difficult. Comparable property values are useful if the records to support those values exist—a burden placed on the claimant if the matter goes to court. Further, the value of the subject property, without certain regulations on that site and its surrounding properties, may well be less than that with the average reciprocity of advantage found in land-use regulations. Moreover, to make such a comparison, one must adjust for inflation—there is likely no "loss" if the two points of comparison are not on a similar plane. This is another issue that must be resolved quickly so that reasoned comparisons may be made between the payment and waiver alternatives.

VI. THE DANGERS OF LAND-USE SCLEROSIS

The enduring damage to Oregon's land-use program, however, will not be the individual claims that may be brought, the money that could be paid, or even the exemptions that might be granted.[114] Rather, the longer lasting damage lies in the unwillingness of the state or local governments to adopt regulations that might be the source of future Measure 37 claims.[115] If the

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112 Or. Dep't Land Conservation and Dev., Final Staff Report and Recommendation, Mildred Fergusson, Claim No. M120347 (June 3, 2005) (adopted by Wildred Fergusson, Final Order, Dep't Admin. Servs., Dep't Land Conservation and Dev., M120347 (Sept. 21, 2005)), *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M118919_Fergusson_Final_Report_pdf. Statewide Planning Goal 7 requires local land-use plans to identify natural hazards and to "protect people and property from natural hazards," including floods. OR. ADMIN. R. 660-15-0000(7) (2005).

113 Ballot Measure 37 § (2) (Or. 2004).

114 One will say there will certainly be new houses in rural areas, however, the present doubt about transferability may make it more difficult to finance the same. For larger projects, providing infrastructure will be a problem for developers in that such a provision is not required and is not cost-free.

115 This is not the first time that procedure has been used to sabotage substance. *See* Ballot

state cannot require local governments to undertake periodic review,[116] and if local governments fail to do so, then planning sclerosis will set in. Local plans and regulations will freeze in place and remain unchanged because of the threat of Measure 37 claims. While the legislature has significantly cut back on periodic review,[117] the notion that plans should be updated is widely viewed as wise. To do their work, planners must work with current population figures and accurate inventories of housing, commercial, and industrial land. Lawyers must defend the rationality and continued consistency of plans and regulations with enabling legislation and other standards.[118] Not only must state and local governments look over their shoulder for claims based on pre-Measure 37 regulations, they must also be mindful of the potential applications of the Measure to new plans and regulations. In addition, the process requires no information, leaves it to under-funded public agencies to do the legwork, and has a one-way attorney fee provision which could cause great damage if a court determines the local government decided the matter incorrectly.

Using existing exemptions to justify amendments or revisions to plans and regulations is one response. However, as suggested above, the contours of many of these exemptions have been largely unexplored. The nuisance exception requires an agency to guess how a court would construe some very difficult case law in an equitable setting, placing the burden on the agency to correctly judge the outcome. The health and safety exemption will likely be the most used device. The agency would be using its legislative judgment which will likely lead to deference from courts, due to separation of powers considerations.[119] If such deference is not given, the public

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Measure 56 (Or. 1998) (requiring notice to property owners of all zoning changes that could negatively affect the value of their property). This initiated Measure, now OR. REV. STAT. §§ 197.047, 215.503–215.513, and 227.186, was advocated as a method of informing citizens. *See* Or. Sec'y of State, Official 1998 General Election Online Voters' Guide, Measure No. 56, http://www.sos.state.or.us/elections/nov398/guide/measure/m56.htm (providing the measure's text as well as arguments for and against) (last visited Jan. 22, 2006). The uniform notice required the state or local government to state that land-use changes "will affect the permissible uses of property." Ballot Measure 56(5)(a) (Or. 1998). The effect of the Measure was to create fear of local governments and the land-use process itself.

116 Periodic review is a process that requires local governments to re-evaluate its comprehensive plans and land-use regulations on a regular basis to assure continued compliance with state policy. *See* OR. REV. STAT. §§ 197.628–197.644 (2003) (providing for periodic review).

117 In 2005, the state legislature decided to reduce the requirements for periodic review to those local governments growing quickly, experiencing substantial activity affecting land use, or volunteering to participate. H.B. 3310, 73d Leg. Assem., Reg. Sess. (Or. 2005).

118 *See* OR. REV. STAT. § 197.175(1) (2003) (establishing planning responsibilities for cities and counties).

119 In *Clark v. Jackson County*, 836 P.2d 710 (Or. 1992), the Oregon Supreme Court held that review by LUBA, and the appellate courts, of a local government's interpretation of its own ordinance is limited. "LUBA and the courts must affirm a local government's interpretation of its own ordinance unless LUBA or [the court] determine[s] that the local government's interpretation is inconsistent with the express language of the ordinance, considered in its context, or with the apparent purpose or policy of the ordinance." Neighbors for Livability v. City of Beaverton, 35 P.3d 1122, 1125 (Or. Ct. App. 2001) This scope of review was codified in

agencies may be faced with judicial "review" of the standards, such as they were, that existed before *United States v. Carolene Products Co.*.[120] Similarly, the "necessity to comply with federal law" exemption is vaguely worded and may only apply when federal law requires a certain outcome, rather than when federal law requires one of a range of choices.[121] The nude dancing and pornography exemptions are not likely to come up much, given Oregon's broad allowance of free expression, except possibly in a civil rights action arising because the exemption targets lawful free speech.[122] There is no application of the "regulations as you found them on acquisition" exemption, at least until a property transfer occurs, because laws, goals, rules, plans and regulations were adopted following enactment of Measure 37.

Although Measure 37 is not a constitutional amendment and there are no statutory or constitutional provisions for enabling or repealing the Measure, there are political implications. The 2005 legislative debate was predicated on achieving balance in amending Measure 37, while preserving its principal provisions. But times change and political memory fades or ascribes attributes to the reasons for, or the nature of, Measure 37, either with or without basis. While the political stars did not align to change

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OR. REV. STAT. § 197.829 (2003). Sometimes LUBA and the courts have restated this standard of review as saying that a local government's interpretation of its code is not reversible unless it is "clearly wrong." Schwerdt v. City of Corvallis, 987 P.2d 1243, 1246 (Or. Ct. App. 1999); Goose Hollow Foothills League v. City of Portland, 843 P.2d 992, 995 (Or. Ct. App. 1992). This restatement has been more recently overruled in *Church v. Grant County*, 69 P.3d 759 (Or. Ct. App. 2003), to provide that the legitimacy of an interpretation of a local plan and ordinance provision depends on its consistency with the terms of the provision, the context of the provision, and the purpose or policy behind the provisions. Conversely, the validity of the interpretation is not determined solely by the reasonableness of an argument created to support it. *Id.* at 767. The *Clark* decision and OR. REV. STAT. § 197.850(9), which was enacted after *Clark*, are more correctly characterized as consistent with the rules of construction announced in *Portland General Electric Co. v. Bureau of Labor and Industries.*, 859 P.2d 1143 (Or. 1993), where meaning is established looking first at the text and context of a legislative enactment, and then if ambiguity still exists, considering the intent of the legislature. *Id.* at 1146.

120 304 U.S. 144 (1938). In upholding a Congressional ban on interstate shipment of milk that contained added fat or oil, the Supreme Court enumerated the "rational basis" test for when a court could overturn a legislative determination. Further, in the now notorious footnote 4, Justice Stone suggested that legislation might be required to show more than a mere "rational basis" in three special situations: 1) when it impinged upon rights expressly protected by the Constitution (such as those in the Bill of Rights); 2) when it restricted normal democratic "political processes" through which people could "ordinarily" protect themselves (as did statutes that deprived citizens on racial grounds of the right to vote); and 3) when it operated against "discrete and insular minorities" (such as disfavored racial or religious groups) which might be prevented by "prejudice" from protecting themselves through the democratic "political processes" that people could "ordinarily" rely upon. *Id.* at 152–53 n.4.

121 As noted in *supra* note 60, much must be litigated to determine the contours of the federal law exemption.

122 *See* State v. Ciancanelli, 121 P.3d 613 (Or. 2005) (holding that state regulation of live sex shows does not fall under a historical exception allowing constraints on some forms of expression, and accordingly that a law prohibiting live sex shows was unconstitutional); City of Nyssa v. Dufloth, 121 P.3d 639 (Or. 2005). (similarly holding that state regulation of erotic dancing does not fall under a historical exception).

Measure 37 in 2005, several issues will likely cause the Oregon legislature to consider the matter regardless of the outcome of the *MacPherson* case.[123]

1) Transferability: Until a court determines otherwise, as a practical matter, raw land with a waiver cannot preserve that waiver if transferred to another person. It appears that lending institutions will not finance property improvements on "waivered" lands;[124]

2) Nonconforming use status: Measure 37 does not require that plans or regulations be changed upon the grant of a waiver. If a claimant obtains a waiver and alienates the property, the new owner may have a nonconforming use, meaning no change or alteration of the use may occur without a permit.[125] However, if the waiver were deemed personal, it would expire when the original landowner alienates the property, as the plan and zoning regulations have not changed. This issue must be resolved by legislation.

3) Evaluation of payment versus waiver alternatives: Measure 37 requires a state agency or local government to pay or waive, but does not establish a standard for doing so. Nevertheless, multiple statutes, goals, and rules that establish state policy on land use have not been affected by Measure 37, such as conservation of resource lands, coordination of economic growth, and compact urban growth boundaries. The decision to pay or waive is not made in a vacuum but against the background of these policies. As such, the decision is subject to review against those policies and regulations, and the public agency must justify its decision to pay or waive in terms of that background.[126]

Oregon law provides that site-specific decisions involving application of law to facts is a quasi-judicial local government decision[127] and thus reviewable by writ of review.[128] The grounds for the writ include instances in which a local government has:

(a) Exceeded its jurisdiction;

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

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

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123 If the trial court decision is affirmed, Measure 37 proponents are likely to place another measure or measures to the same effect on the ballot. Whether affirmed or reversed, the legislature is likely to search for a compromise to head off ballot prospects.

124 Sherman, *supra* note 70, at 11.

125 *See* OR. REV. STAT. § 215.130 (2003) (providing for non-conforming uses subject to a county's comprehensive plan). Cities have no enabling legislation regarding nonconforming uses, but many local ordinances have fairly strict provisions regarding nonconforming uses.

126 *See* State *ex rel.* City of Powers v. Coos County Airport Dist., 119 P.3d 225, 228–29 (Or. Ct. App. 2005) (discussing when writ of review is available).

127 Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23, 26 (Or. 1973) (discussing standard of review for zoning decisions by local governing bodies).

128 OR. REV. STAT. §§ 34.010–34.102 (2003) (specifying rules for writ of review); *see also* Brooks v. Dierker, 552 P.2d 533, 535 (Or. 1976) (discussing writ of review as the normal way to obtain judicial review of quasi-judicial actions of local governments).

(d) Improperly construed the applicable law; or

(e) Rendered a decision that is unconstitutional.[129]

Similarly, a state agency decision resulting in the grant or denial of a claim may be reviewed as a "decision in other than a contested case" under Or. Rev. Stat. § 183.484 in the circuit court for Marion County, which has wide powers of review.[130]

A decision to pay or waive cannot be reviewed without justification of the decision against the background of applicable law—how is a decision to waive justified against the state's land-use policy without considering the alternative of payment? Some public agencies may object that section 7 of Measure 37 obviates any obligation for the claimant to provide that information.[131] The Measure, however, does not release public agencies from their obligations to justify their decisions against the background of applicable law.

Moreover, a third-party challenge to such a decision does not make the public agency liable for attorney fees if it has made a decision to waive (although that decision may be incorrect) within the 180-day period provided under Measure 37. Multiple claims and the threat of attorney fees have overwhelmed public agencies—multiple challenges to waiver decisions need not do so, particularly if the public agency is not obliged to do more than return the writ with the record or otherwise defend the decision to waive.

4) Waivers without substance and deferred decisions: Led by the state of Oregon, some public agencies grant "waivers" which mean very little. For example, the waiver will exclude often unspecified public "health" and

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129 OR. REV. STAT. § 34.040 (2003).

130 By statute,

(a) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(A) Set aside or modify the order; or

(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

(A) Outside the range of discretion delegated to the agency by law;

(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

(C) Otherwise in violation of a constitutional or statutory provision.

(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

OR. REV. STAT. § 183. 484(5) (2003).

131 Ballot Measure 37 § (7) (Or. 2004).

"safety" regulations, waiting to spell out those exclusions until the time a specific development proposal is brought.[132] This response is particularly justified when a claimant does not specify a proposed use of land or presents multiple possible uses.

5) The double whammy: Many local regulations, which are the basis for Measure 37 claims, are also required by state statutes, goals, or rules.[133] In that event, a claimant must bring claims against both entities, requesting that both sets of rules be waived in order to succeed. If either of those sets of regulations precludes the development, however, then the application will fail as a practical matter. Conceivably, a waiver granted by one level of government may be challenged by another level, so as to challenge without the threat of attorney fees. The result is that if a county had an obligation to adopt exclusive farm zones to preserve agricultural lands as of 1974, any property acquired after that date will be subject to those obligations even if the county failed to adopt the plan or implementing regulations for many years thereafter.

6) Transfers to and from non-natural "persons": A consequence of Measure 37's relation back approach is that the person or family member must have acquired the property prior to the restrictive regulation to avoid its application. Thus, if John McLoughlin first acquired a home in Oregon City in 1825 and the house remained in the family until 2005, the decedents could relate back their claims regardless of the regulations in effect at the time of acquisition. While this approach may allow timber companies—whose corporate predecessors acquired land in 1875 and may have merged or been acquired by other companies—to relate back, this will not work if the transaction was with another "person," i.e., a corporation that was owned by a family member.

7) Reduction in fair market value: If a Measure 37 claim proceeds to circuit court, the burden is on the owner to show reduction and fair market value under section 2 of the Measure.[134] This is the sole source of the government payment obligation. While the public agencies may be cowed by the threat of an attorney fee claim, the claimant must still prove a reduction in fair market value. Further, third-party opponents can challenge without exposing the public agency to liability for attorney fees.

Until consensus for revision of the current alignment of statutory law develops, it is likely that various interests will use the courts to advance their versions of the balance imposed by Measure 37 on the Oregon land-use

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[132] Waivers to a Goal 4 (Forest Land) may be restricted by health and safety factors underlying OR. ADMIN. R. 660-006-0025(5)(b) (2005), which requires consideration of whether the use will enhance the likelihood of forest fires. Likewise, LCDC cannot grant waivers for regulations which implement Goal 7 (Areas Subject to Natural Hazards) such as floodplain regulations, which also involve health and safety matters.

[133] For example, prohibitions on dwellings and resource lands are often required by state law, but administered locally. For those dwellings not allowed under the farm use statutes, one must use OR. REV. STAT. § 215.284 (2003), a statute fraught with discretion, and withdraw the land on which the dwelling would exist from the preferential assessment allowed farm land, as well as pay back taxes. OR. REV. STAT. § 215.236 (2003).

[134] Ballot Measure 37 § (2) (Or. 2004).

system. Until that review occurs, little legislative change is likely at the state or local levels, and the change that does occur will likely be in terms of exemptions from the Measure's effect, particularly for health and safety. Even if these exemptions are used successfully, the legislature will not undertake much planning and regulation for fear of Measure 37 claims.

VII. CONCLUSION

Those reading the history of this part of Oregon's land-use program may well ask what the executive branch and conservation groups were thinking in frustrating a legislative response and being so far behind in exploring the ambiguities and parameters of Measure 37 in the courts. A noble failure is still a failure. Perhaps the land-use program may be saved by an unexpected favorable decision in the *MacPherson* case—and that which occurred by similar deft legal work in 2000 to defeat a similar measure approved by the voters[135]—so as to justify the serenity that arises from a righteous position. Even with such a victory, in light of two solid expressions of the electorate, it is more likely that the program faces a Gotterdammerung, rather than quiet enjoyment of that land-use Valhalla constructed over thirty-five years ago.

Measure 37 has more than just the potential to change the shape of things to come. It has the potential to unravel over thirty years of valuable planning and compromise. Statewide planning goals that have long been in effect may be forsaken at the whim of the individual landowner. The Measure insults the remarkable vision demonstrated by past generations of Oregonians in their ability to look beyond their immediate needs.

As the sheer inability of local governments to meet demands for payment is already plain, it is on the waiver of regulations which attention must now focus. To "forego enforcement" achieves only short-term gratification for individual owners. The costs of waiver cannot be justified: neighbors and posterity will be obliged to forego the benefits of controlled urban expansion and the scenic communities in which previous generations had the pleasure of living. These costs are in addition to the externalities imposed on neighbors as a direct result of the grant of a waiver, such as reduced property values, congestion, increased infrastructure costs, and the like. Viewed in full daylight, forbearance of enforcement is a most unattractive prospect.

Local governments have been emasculated and rendered powerless to continue regulating land use in a predictable, fair, and effective way. The unparalleled Oregon planning program is not merely fortuitous; it is the result of careful compromise and consideration. As SB 100 identified back in 1973, uncoordinated planning was destroying the state.

In the face of Measure 37, there is a tangible threat of a regulation rollback on a property-by-property basis, leading to an incoherent

[135] Ballot Measure 7 (Or. 2000) was ruled unconstitutional by *League of Oregon Cities v. State*, 56 P.3d 892 (Or. 2002).

patchwork of land-use regulations and reluctance by state, regional, or local governments to undertake most new land-use regulations because of the Measure.[136]

The terms and procedures used in Measure 37 need fleshing out—particularly through strategic litigation. Meanwhile, as the implications of the new legislation continue to unfold, a credible review of the thirty-year-old state planning program may provide an opportunity for change by consensus.[137] For the time being, however, avoidance of malpractice suits will remain an important item on the agenda of lawyers, realtors, appraisers, and other professionals advising landowners, neighbors, and public entities regarding the vague and contradictory provisions of Measure 37.

Policy makers and planners must be clear-eyed about the reasons for, as well as the repercussions of, the passage of Measure 37. For if it can happen in Oregon, where most citizens support planning, it can happen anywhere. It can hardly be said in the 2004 election that Oregon voters did not have access to information on the implications of Measure 37. It appears the voters held to two contradictory propositions—planning and land-use regulations are good public policy and "the government" must pay if land-use regulations cause any economic harm to property values. Oregon's experience should go to show that neither problems, nor solutions, are simple and that the need for immediate gratification by the "me generation" creates its own set of problems to be solved. The time has now come to confront these, as Measure 37 begins a new chapter in Oregon's planning history.

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136 Letter from Hardy Myers, *supra* note 68.

137 One newspaper opined: "But eventually, the Legislature must reform this retrograde measure and limit the damage it is capable of doing to Oregon's legendary land-use system and its quality of life." Editorial, *Measure Still a Mess: Lawmakers fail to reform property rights law*, REGISTER-GUARD (Aug. 9, 2005), at A12, *available at* http://www.registerguard.com/news/2005/08/09/ed.edit.
measure37.phn.0809.p1.php?section=opinion.