TYING UP LOOSE ENDS: RESOLVING AMBIGUITY IN BALLOT MEASURE 37'S PUBLIC HEALTH AND SAFETY EXEMPTION

BY

JEANNIE LEE*

Oregon's property rights measure, known as Measure 37, has had immeasurable impacts on the state and its comprehensive land use planning program, which has been in existence for over thirty years. While Measure 37 threatens to erode the gains made by the state's planning program, all levels of government may be able to use the exemptions embedded in the statute as a tool to preserve some of the goals of Oregon's planning program. This Comment examines the boundaries of the public health and safety exemption in Measure 37, by applying the analytical framework established in Portland General Electric v. Bureau of Labor and Industries*. Under this analysis, Oregon courts are likely to find that the government may exempt some land use regulations and cast a wider regulatory net than initially though under the regulation. This Comment also discusses three different procedural options available to aggrieved claimants or their neighbors in response to an approved Measure 37 claim.*

* Form and Style Editor, *Environmental Law*, 2007–2008; Member, *Environmental Law*, 2006–2007; J.D. expected 2008, Lewis and Clark Law School; M.C.P. 2002, University of California, Berkeley (City Planning); B.A. 2000, University of California, Berkeley (English); B.S. 2000, University of California, Berkeley (Conservation and Resource Studies); Member, American Institute of Certified Planners. The author extends great thanks to Professor Ed Sullivan for his guidance through the writing process and his wealth of knowledge. The author also thanks Professor Anne Villella for her invaluable support and guidance. Finally, the author thanks Professor Kevin Adams for his keen editorial eye.

I. INTRODUCTION

For some, the passage of Oregon's property rights measure in 2004, known as Measure 37,[1] has proven to be a pyrrhic victory. Some supporters of Measure 37 had hopes that it would allow them to realize their financial dreams by converting their land into huge subdivisions.[2] Others had more modest dreams of simply building a home on their property that was barred otherwise by current land use laws.[3] Regardless of individual motives, supporters united to pass Measure 37, which allowed some landowners the chance to develop their land under fewer land use regulations or receive "just compensation" for the lost market value of their property due to the regulations.[4] Now over three years after Measure 37's passage, landowners in resource-sensitive coastal and rural areas are clamoring to develop on their land, voters who once supported the initiative are now changing their minds, and landowners are bombarding the government with Measure 37 claims. The question that currently confronts the state, Metro,[5] and local governments is how to proceed. One avenue is to look directly at the tools

[1] The author wrote this Comment before Oregon voters passed Measure 49 in November 2007, which, among other things, modified the public health and safety exemption by deleting the latter portion of the exemption. Measure 49 also included a definition of "protection of public health and safety." For the full text of Measure 49, please see Oregon's Secretary of the State's website at http://www.sos.state.or.us/elections/nov62007/guide/m49_text.html.

[2] Randy Neves & Sean Jacks, *Governor Kicks Off Plan to "Fix" Measure 37* (July 12, 2007), www.kgw.com/news-local/stories/kgw_071207_news_measure_49.6b5be9b8.html (last visited Jan. 27, 2008).

[3] *Id.*

[4] Ballot Measure 37, Governments Must Pay Owners, Or Forgo Enforcement, When Certain Land Use Restrictions Reduce Property Value, § 1 (Or. 2004) (codified at Or. Rev. Stat. § 197.352 (3)(B)(2005)) (voted on in the General Election, Nov. 2, 2004) [hereinafter Measure 37].

[5] Metro is a regional planning organization that serves three counties and the 25 cities in the Portland metropolitan area. Metro, About Metro, http://www.metro-region.org/index.cfm/go/by.web/id=24201 (last visited Jan. 27, 2008). In addition to other programs, Metro manages the region's growth through an urban growth boundary and it reviews the region's land supply every five years. Metro, Urban Growth Boundary, http://www.metro-region.org/article.cfm?ArticleID=277 (last visited Jan. 27, 2008).

embedded in Measure 37—the exemptions for certain land use regulations. In particular, subsection (3)(B) of Measure 37, which exempts regulations that restrict or prohibit activities protecting the public health and safety, appears to cast a wide regulatory net in favor of the government. However, the full extent of regulatory power that the exemption grants to the state, Metro, and local governments still remains ambiguous.

The sheer number of Measure 37 claims and total acreages is overwhelming. The most current tally of the total number of statewide Measure 37 claims is 7717 claims, totaling 792,327 acres.[6] As of July 2007, the total value of claims was approximately $15 million in value.[7] Most recently, from October 20, 2007 to December 5, 2007, the government has received 6857 claims,[8] asking for a total compensation of $19,844,379,986 for these claims.[9] Additionally, an overwhelming number of claims are in exclusive farm use zones.[10] The government already has applied the public health and safety exemption to some of the Measure 37 claims.[11]

Understanding the statutory meaning of the exemption, and its potential impact on existing and future claims, leads the state, Metro, and local governments to confront many shades of gray. The purpose of this Comment is to examine the boundaries of the public health and safety exemption by applying the analytical framework established in *Portland General Electric v. Bureau of Labor and Industries* (*PGE v. BOLI*).[12] Under level 1 of the *PGE v. BOLI* analysis, the court's interpretation of the text is limited to the text itself and the context of the measure, which includes the voters' intent in passing the initiative. Under this analysis, the court is likely to find that the government can justify more land use regulations than appearing at first glance under the public health and safety exemption.

In the near future, the tension between the perception of the government as a "one-size-fits-all bureaucracy run amok"[13] by Measure 37

---

6 Portland State University, Measure 37: Database Development and Analysis Project, Table 1: Summary of Claims by Current and Proposed Use, http://www.pdx.edu/ims/m37database.html (last visited Jan. 27, 2008) (tables were last updated on Oct. 4, 2007).

7 Neves & Jacks, *supra* note 2.

8 Dep't of Land Conservation and Dev., *Measure 37,* SUMMARIES OF CLAIMS, *available at* http://www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml#Summaries_of_Claims_Filed_in_the_State (last visited Jan. 27, 2008).

9 *Id.*

10 *Id.*

11 *See, e.g.*, Or. Dep't Land Conservation & Dev., Ballot Measure 37 Claim for Compensation: Final Staff Report and Recommendation, Claim No. M119116, at 1 (June 23, 2005) (for claimants Victor C. and Pamela J. Cobos), *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M119116_Cobos_Final_Report.pdf (concluding that Statewide Planning Goals 3 and OAR 660, Division 33 do not apply to the Cobos' property); Or. Dep't Land Conservation & Dev., Ballot Measure 37 Claim for Compensation: Final Staff Report and Recommendation, Claim No. M118919, at 1 (June 3, 2005) (for claimant Mildred Fergusson), *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M118919_Fergusson_Final_Report.pdf (concluding that Statewide Planning Goals 14 and 2 do not apply to Ms. Fergusson's property).

12 859 P.2d 1143 (Or. 1993).

13 Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon's Measure 37*, 21 J. L. & POL. 397, 435 (2005).

proponents and the government's desire to maintain a thoughtfully crafted land use planning system will cause more litigation.[14] The government will most likely argue for a broad reading of the public health and safety exemption while developers and landowners will argue for a narrow construction. For now, the Oregon courts have not begun to explore the theoretical boundaries set by the voter's intent; however, the state, Metro, and local governments should hesitate to assume that the application of the public health and safety exemption can only apply to a limited set of land use regulations as listed in the statute. Although the exemption does not include regulations that protect the public welfare, thus curbing the police power, the government's power to regulate may not be completely weakened.

This Comment is organized into five parts. Part I includes a brief description of Measure 37 and the meaning of land use regulations, which are at the heart of the Measure 37 debate. Part II presents an introduction to the origins of Oregon's comprehensive land use planning program, including Senate Bill 100 and Measure 7, an initiative crafted in an attempt to erode the gains made by Senate Bill 100. Both Senate Bill 100 and Measure 7 are hugely important to the history of land use regulation and provide the backdrop for the rise of Measure 37. Part III discusses the police power, which grants the government the authority to enact regulations, including land use regulations, to protect the public health, safety, and welfare. Part IV presents the *PGE v. BOLI* methodology for statutory interpretation in Oregon and offers to show how the voters' intent in passing Measure 37 does not necessarily limit the scope of the initiative's public health and safety exemption. Finally, Part V discusses three different procedural options available to aggrieved claimants or their neighbors in response to an approved Measure 37 claim. Aggrieved persons can either bring a takings claim, ask for declaratory relief, or petition for a writ of review to define their rights in circuit court. Despite the existing avenues for judicial review, Measure 37 oversteps the Land Use Board of Appeals to hear such claims and relegates land use decisions to the circuit court system. Because of their expertise, the Land Use Board of Appeals would be the most appropriate judicial body to review decisions regarding the public health and safety exemption.

A. Measure 37

In November 2004, the majority of Oregonians approved Measure 37, but not without controversy. The chief petitioner of the initiative, Oregonians in Action (OIA), pushed forward Measure 37 to correct some of the perceived wrongs of Oregon's land use planning system. The drafters cleverly worded Measure 37 to downplay the message of undoing the state's

[14] *See* David J. Hunnicutt, *Oregon Land-Use Regulation and Ballot Measure 37: Newton's Third Law at Work*, 36 ENVTL. L. 25, 42 (2006) (forewarning that the public health and safety exemption will likely result in litigation).

carefully crafted land use system and to highlight the message of making property owners whole, similar to the message in Measure 7, which focused on fairness. Proponents readily accepted the message of fairness because many of them sought to profit from development of their land. State administrative regulations requiring rural landowners to have gross farm receipts of $80,000 per year for a set period of time before they could build new homes on their high value farmland[15] created tension and added fuel to the property rights movement. At the same time, opponents saw Measure 37 as taking a jackhammer to the state's sound land use planning policies aimed to preserve open space and limit urban growth.[16] Organizations such as 1000 Friends of Oregon, Audubon Society of Portland, Oregon Chapter of the American Planning Association, and the Sierra Club united in their fight to "keep Oregon a great place to live."[17]

Why all the fuss? Measure 37 entitles a private property owner, or family member who subsequently becomes the property owner, to receive "just compensation" if, after gaining ownership, the state or local government enacts or applies a land use regulation restricting the property's use, thus reducing its fair market value.[18] Alternatively, public entities can "modify, remove, or not apply the land use regulation."[19] Not only does Measure 37 apply to all future applications of land use regulations, but Measure 37 also has retroactive application to all existing land use regulations.[20]

Even before claimants began submitting their claims to the state and local governments, the writing on the wall was clear—the state's overcommitted budget would be unable to compensate all or most claimants, thus the primary remedy for many landowners would be near-total deregulation subject to certain exceptions.[21] One circuit court clarified the link between waiver and compensation by ruling that "a waiver granted . . . need not be proportional to the compensation due a claimant under the statute."[22] Thus, Measure 37 creates a low bar, allowing government agencies to waive regulations provided that only some compensation is due.[23] Although most governments are more likely to waive regulations, some government agencies have set aside funds for exceptional

---

15 OR. ADMIN. R. 660-033-0135(7)(a) (2005).

16 *See* JOHN M. DEGROVE, PLANNING POLICY AND POLITICS: SMART GROWTH AND THE STATES 38 (2005) (stating that "Measure 37 would rip the heart out of Oregon's land use planning system").

17 *Id.*

18 Measure 37, *supra* note 4, § 1.

19 *Id.* § 8.

20 DEGROVE, *supra* note 16.

21 Jules Kopel-Bailey, Protect the Public Good. No on Measure 37, BLUEOREGON, Oct. 27, 2004, http://www.blueoregon.com/2004/10/protect_the_pub.html.

22 Vanderzanden v. Land Conservation and Dev., No. 05C19565, Ltr. Op. 7 (Or. Cir. Ct. Jan. 8, 2007), *available at* http://www.doj.state.or.us/hot_topics/pdf/measure37/decision_vanderzanden_messer_hoodrivervalleyres_comm_martin.pdf.

23 GEORGETOWN ENVTL. LAW & POL'Y INST., PROPERTY VALUES AND OREGON MEASURE 37, at 5 (2007), *available at* http://www.law.georgetown.edu/gelpi/GELPIMeasure37Report.pdf.

claims;[24] however only one—the City of Prineville—has made a payment for just compensation to a landowner.[25]

Before a public entity can "modify, remove, or not apply" a land use regulation or comprehensive plan, Measure 37 applications must meet certain requirements. The requirements essentially serve as a gatekeeper and public entities must review the specific facts of each application to make their determination based on the requirements. Applicants must demonstrate that "the claimant acquired the affected property before the law in question was adopted; the law restricts the use of the property in question; [and] the law reduces the fair market value of the property."[26] Even though an application may pass these requirements, Measure 37 provides five types of land use regulations that are exempt and will continue to apply to claimants. These exempted land use regulations include: 1) common law public nuisances, 2) public health and safety regulations, 3) regulations required under federal law, 4) regulations restricting the selling of pornography or performing nude dancing, and 5) regulations enacted before property acquisition by the claimant.[27] These exemptions essentially act as a second gatekeeper and the government will most likely interpret these exemptions broadly to prevent non-conforming and unplanned uses from completely undermining the established growth management system.

B. Land Use Regulations

Land use regulations are at the center of the Measure 37 debate. They play a vital role in the proper functioning of the state's comprehensive land use management strategy. Without a land use regulation at issue, there can be no Measure 37 claim,[28] thus an understanding of the term "land use regulation" is of key importance.[29] Closely following Oregon's statutory definition of a "land use regulation,"[30] Measure 37's definition includes: 1) any statute regulating land use, 2) the Land Conservation and Development Commission's (LCDC's) statewide planning goals and guidelines, 3) local government comprehensive plans, zoning ordinances, land division

[24] *See* GEORGETOWN ENVTL. LAW & POL'Y INST., SUMMARY OF MEASURE 37, at 5 (2006), *available at* http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Leg_M37commentary.pdf.

[25] *Prineville Makes Oregon's First Measure 37 Payment*, OREGONIAN, Sept. 13, 2007, *available at* http://blog.oregonlive.com/breakingnews/2007/09/prineville_makes_oregons_first.html. Prineville paid Grover Palin $180,000 for two claims against the city for prohibiting him from building one single-family home and a hotel. *Id.*

[26] Letter from Stephanie Striffler, Special Counsel to the Attorney General, Or. Dep't of Justice, to Lane Shetterly, Director, Oregon Dep't of Land Conservation & Dev. 2 (Feb. 24, 2005), *available at* http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf.

[27] Measure 37, *supra* note 4, § 3(A)–(E).

[28] OFFICE OF GOVERNOR KULONGOSKI, 2004 OREGON BALLOT MEASURE 37 INITIAL QUESTIONS AND ANSWERS 5 (2005), *available at* http://www.orcities.org/Portals/17/CurrentIssues/M37/M37Q&A.pdf.

[29] Lauren Sommers, *A Practical Guide to Measure 37*, 20 J. ENVTL. L. & LITIG. 213, 217 (2005).

[30] OR. REV. STAT. § 197.015(12) (2005) ("'Land use regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.").

ordinances, and transportation ordinances, 4) Metropolitan service district regional plans, planning goals, and objectives, and, 5) farming and forest practice statutes and administrative rules.[31] Regulations embedded in land use ordinances may be excluded from the definition of a land use regulation "if the substance of the regulation clearly pertains to something other than land use."[32] Additionally, the list of land use regulations in subsection (11)(B) of Measure 37 is most likely an exclusive list based on the enumerated exclusions and the plain textual language, which gives no hint of further expansion.[33] Thus, any other agency rules that extend beyond the enumerated list of land use regulations cannot be the basis of a Measure 37 claim.[34]

II. ORIGINS OF OREGON'S LAND USE PLANNING SYSTEM

A. Senate Bill 100

Prior to Senate Bill (SB) 100, planning was accomplished at the local and county level. However, such planning was largely ineffective because officials readily approved variances from established zoning ordinances.[35] In the Willamette Valley, farmers increasingly feared that the state's richest farmland would give way to suburban sprawl, development pressures, and poorly planned subdivisions.[36] The legislature took an affirmative step in 1963 and adopted an "exclusive farm use" zone that restricted non-farm development on land within the zone. A surge of concern to protect the state's unique environmental resources culminated in 1969 when the legislature passed SB 10,[37] which required local governments to prepare comprehensive land use plans and zoning ordinances.[38] For many years to come, the public and the government would share this common goal of environmental protection that the government would achieve through sound planning.[39]

---

[31] Measure 37, *supra* note 4, § (11)(B)(i)–(v).

[32] Fence v. Jackson County, 135 Or. App. 574, 577 (1995).

[33] Section 3 of Measure 37 fails to state expansive language that would indicate non-exclusivity, such as stating that the exemptions include, but are not limited to the enumerated exemptions. Measure 37, *supra* note 4, § 3.

[34] OFFICE OF GOVERNOR KULONGOSKI, *supra* note 28, at 5.

[35] RICHARD W. JUDD & CHRISTOPHER S. BEACH, NATURAL STATES: THE ENVIRONMENTAL IMAGINATION IN MAINE, OREGON, AND THE NATION 192 (2003).

[36] *Id.* at 190–91; Carl Abbott, Sy Adler & Deborah Howe, *A Quiet Counterrevolution in Land Use Regulation: The Origins and Impact of Oregon's Measure 7*, 3 HOUSING POL'Y DEBATE 383, 388 (2005), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1403_abbott.pdf.

[37] Metro, A History of Metro, http://www.metro-region.org/article.cfm?ArticleID=2937 (last visited Jan. 27, 2008).

[38] Abbott, Adler & Howe, *supra* note 36, at 389.

[39] Sarah C. Galvan, Comment, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL'Y REV. 587, 597 (2005).

Senator Hector McPherson and Senator Ted Hallock, with Governor Tom McCall and other bill sponsors,[40] saw the need to refine SB 10 and introduced SB 100 in 1973.[41] Governor McCall was, in particular, an effective messenger of the bill and repeated his message from the publicity of SB 10—that developers would make "hamburger of the land, chopping it up into little pieces"[42]—and declared that Oregon's "future must be protected from grasping wastrels of the land."[43] Citizens and legislators alike were divided on the issue of whether statewide control over land use decisions was appropriate, which eventually led the legislators to compromise somewhere between state-directed planning and local control.[44]

SB 100 created a comprehensive growth management plan, including the establishment of urban growth boundaries (UGBs). The purpose of UGBs was to surround incorporated cities and separate urban development from rural and forest lands. Policies for land outside the UGBs focused on protecting the economic health of the agricultural and forest industries as well as restricting land use to resource-related development.[45] SB 100 required UGBs to include a twenty-year land supply for expected urban growth, which local governments would coordinate under the rubric of statewide planning.[46]

SB 100 not only established a conceptual framework for growth, but also a body to oversee this framework. SB 100 established a seven-member commission, known as LCDC[47] and the Department of Land Conservation and Development (DLCD). LCDC oversees DLCD's day to day administration of the statewide planning program.[48] From the very beginning, LCDC proved to be the centerpiece of Oregon's land use planning program by developing and adopting nineteen statewide planning goals, all of which are also administrative rules.[49] Guidelines accompany many of the goals and serve as recommendations about how the government may apply the goals.[50] The originally adopted goals and guidelines grew out of a vigorous public review process in 1974, including a series of statewide workshops and public hearings, and they represented "what citizens of Oregon believe should be accomplished."[51] Generally, the goals fall into five categories: "1) the

40 Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 814 (1998).

41 S.B. 100, 57th Leg., Reg. Sess. (Or. 1973).

42 JUDD & BEACH, *supra* note 35, at 193.

43 Governor Tom McCall, Opening Address to the 1973 Legislative Assembly, 57th Leg. (Jan. 8, 1973), *available at* http://arcweb.sos.state.or.us/governors/McCall/legis1973.html.

44 JUDD & BEACH, *supra* note 35, at 200.

45 Abbott, Adler & Howe, *supra* note 36, at 390.

46 *Id.*

47 OR. REV. STAT. § 197.030 (2005).

48 *Id.* § 197.040(1)(a); Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 135 (2006).

49 CHARLES F. HUDSON & PETER LIVINGSTON, LAND USE PLANNING AND EMINENT DOMAIN IN OREGON 20 (2002).

50 *Id.*

51 Land Conservation & Dev. Comm'n (LCDC), Order Adopting Statewide Goals and Guidelines, *in* Adoption by the Land Conservation and Development Commission of Statewide

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."[52]

Implementation of SB 100 requires that all state and local government land use decisions conform to LCDC's planning goals.[53] All local governments must submit their comprehensive plans and implementing regulations to LCDC, which then reviews for consistency with the applicable statewide planning goals.[54] LCDC's approval of consistent plans and regulations is known as "acknowledgment," which LCDC reviews in four- to ten-year cycles for continued compliance of any amendments.[55] The statewide planning goals provide an independent basis to challenge state and local government land use decisions.[56] Prior to acknowledgment, land use decisions regarding individual land parcels are directly subject to LCDC's planning goals.[57] After acknowledgment, the focus shifts and individual parcels are reviewed against acknowledged plans and regulations.[58]

SB 100 is a planner's dream and a proven success. Although some people who favor deregulation may argue otherwise, comprehensive planning helps communities identify existing and emerging issues and create a roadmap to deal with those issues.[59] Moreover, planning protects natural resources by separating development from sensitive areas, and it protects private property by minimizing impacts from adjacent or nearby incompatible uses.[60] In Oregon, all cities and counties have adopted comprehensive land use plans and every city has adopted an urban growth boundary.[61] These positive outgrowths from SB 100 have only strengthened land use planning in Oregon. The high level of participation during the public review process that helped shape the content of the land use planning program in 1974 partly explains the success of the program.[62] Growth management advocates successfully blocked several threats by referendums to SB 100 in 1976, 1978, and 1982, which challenged the control and enforcement of the planning program rather than the content of the goals.[63]

Planning Goals and Guidelines, LCDC Order #1, at 1 (1974) (effective Jan. 25, 1975).

52 Sullivan, *supra* note 48, at 135.

53 *Id.*

54 PETER W. SALSICH & TIMOTHY J. TRYNIECKI, LAND USE REGULATION 30 (American Bar Ass'n 2d ed. 2003) (1991).

55 DEGROVE, *supra* note 16, at 14.

56 OR. REV. STAT. §§ 197.175(2)(c), 197.180(9) (2005); Sullivan, *supra* note 48, at 135.

57 Sullivan, *supra* note 48, at 135.

58 OR. REV. STAT. § 197.628 (2005); Sullivan, *supra* note 48, at 135.

59 PHILIP R. BERKE ET. AL., URBAN LAND USE PLANNING 6 (5th ed. 2006).

60 1000 Friends of Wisconsin, The Benefits of Comprehensive Planning for Communities of All Sizes 1, *available at* http://www.1kfriends.org/documents/BenefitsofCompPlanning.pdf.

61 William A. Van Vactor, Jr., *The Backlash to Land Use Regulation Continues: An Analysis of Oregon's Measure 37*, 26 J. LAND RESOURCES & ENVTL. L. 221, 225 (2005).

62 Abbott, Adler & Howe, *supra* note 36, at 390.

63 *Id.*

B. Trouble Brewing—Measure 7

"Measure 37 didn't come out of the blue."[64] The passage of Measure 7 in 2000 portended the sea change Measure 37 would bring. From 1982 to 2000, there were no direct attacks on Oregon's planning program.[65] However, the property rights movement started to gain momentum as economic and legal conditions began to change in the 1990s.[66] Oregon experienced rapid economic growth in the high-technology manufacturing sector,[67] constituting a major economic shift away from the timber and mining industries. The City of Portland in particular felt the effects of subsequent increases in land prices as the urban population rose. The public and the government's united interest in protecting environmental resources through land use planning in the earlier decades also began to diverge in the early 1990s. For example, the City of Portland passed environmental overlay regulations to prevent construction on steep slopes, which angered many landowners because it impeded their ability to make full use of their properties.[68] At the same time, rural landowners feared the erosion of the rural landscape and the idyllic conditions that characterized rural life. The Oregon Supreme Court addressed landowner concerns in inconsistent opinions regarding takings cases and the Land Use Board of Appeals' (LUBA's) administrative remedies overwhelmingly favored local governments.[69] The combination of these concerns and the pressure to develop land eventually led to the passage of Measure 7 in 2000.

Similar in purpose to Measure 37, Measure 7 was a constitutional amendment requiring compensation to landowners for any reduced value caused by an imposition of land use regulations.[70] The proponents of Measure 7 offered a simple message that resonated with many property owners: fairness. Similar to the reaction to Measure 37, opponents of Measure 7, including 1000 Friends of Oregon, banded together to fight the measure's attack on the state's comprehensive land use planning scheme.[71] Although Measure 7 passed with fifty-three percent of the vote,[72] two years later the Oregon Supreme Court upheld a lower court's decision that the measure was unconstitutional and invalidated the measure.[73] With the downfall of Measure 7, property rights advocates went back to the drawing board to create Measure 37. The key difference between the two was the alternative mechanism for relief from the government's imposition of land

64 Telephone Interview by Jim Morris with Lane Shetterly, Dir., Or. Dep't Land Conservation & Dev. (Aug. 28, 2006), *available at* http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=121&Itemid=51.

65 Abbott, Adler & Howe, *supra* note 36, at 390.

66 Van Vactor, *supra* note 61, at 225.

67 Abbott, Adler & Howe, *supra* note 36, at 391.

68 *Id.* at 394.

69 Van Vactor, *supra* note 61, at 225.

70 DEGROVE, *supra* note 16, at 34.

71 *Id.*

72 Sullivan, *supra* note 48, at 137.

73 League of Or. Cities v. State, 56 P.3d 892, 896 (Or. 2002).

use regulations impressed after a property owner gained rights to the property.[74] Although Measure 7 was ultimately invalidated by the Oregon Supreme Court, the citizen support it received indicated an important shift in citizens' perception of how far Oregon planners and lawmakers should go in regulating private property for the common good.

III. EXERCISING THE POLICE POWER

Through the police power, state government has the inherent authority to enact regulations—for land use and beyond—protecting the public health, safety, and welfare.[75] Traditional state police powers include zoning and subdivision controls.[76] Sometimes attached to this "triad"[77] of the public health, safety, and welfare is the regulation of the public morals.[78] Generally, the basic purpose of the police power as it relates to land use is to protect the community from incompatible and harmful land uses.[79]

Notions of the police power have had a long history. Dating back to 451 B.C., Rome's early code, known as the Twelve Tables, included fire, safety, and wastewater regulations for the purpose of protecting public health.[80] In the United States, rapidly urbanizing cities commonly used the police power in the second half of the 1800s[81] to address problems arising from the influx of people and uncoordinated changes in land use. Transportation systems, municipal water supplies, and sanitation systems could not effectively respond to the rapid growth, which facilitated nonconforming uses and the spread of disease.[82] In response, cities applied nuisance law to control urban development;[83] however, nuisance law proved to be a limited tool to restrict incompatible land uses particularly as society became more complex.[84] The solution came with the police power, which cities used to fill the regulatory gap.

---

74 Telephone Interview by Jim Morris with David J. Hunnicutt, President, Oregonians in Action (Sept. 25, 2006), *available at* http://www.takingsinitiatives.org/index2.php?option=com_content&task=view&id=122&Itemid=51.

75 *See* SALSICH & TRYNIECKI, *supra* note 54, at 3 ("The authority to regulate the use and development of land is derived from the police power of the state."); Hans Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 148 (1970) (noting that by calling "a law a 'police' regulation if its objective concerns public health or safety or morals or welfare does not mean that it may be enacted *because* it has such an objective, but only that laws passed for such objectives are so described").

76 *See* SALSICH & TRYNIECKI, *supra* note 54, at 4, 5.

77 Sullivan, *supra* note 48, at 144.

78 *See* SALSICH & TRYNIECKI, *supra* note 54, at 3.

79 GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE'S ACQUISITION, USE, AND CONTROL OF PRIVATE PROPERTY 23 (1998).

80 Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 497 (2000).

81 Scott M. Reznick, Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 858 (1973).

82 *Id.* at 858–59.

83 *Id.* at 859–60.

84 *Id.* at 860.

The text of the United States Constitution bears no mention of the police power, yet the police power is a widely recognized mechanism of regulatory power that has its roots in substantive due process. Professor Hans Linde, however, makes a careful distinction: Oregon's constitution does not have a due process clause that is analogous to the federal fourteenth amendment[85] and no state or federal constitution grants Oregon, or any other state, the police power.[86] Professor Linde notes that the state of Oregon has plenary power to legislate subject to constitutional limits, but has no source of state police power.[87] Statutes or home-rule provisions of the state constitution confer legislative powers to local governments. Thus, the question of whether the local or state government can legislate to protect the public health, safety, and welfare depends on the legal authority conferred to the state or local government.[88]

The parameters of the police power are ambiguous at best and as a result, the concept of the "police power" engenders a constant struggle. On one hand, state and local governments promulgate myriad laws to protect the public health, safety, and welfare, but often fail to provide concrete explanations as to what characteristics of the regulated activity exactly promote the public health, safety, and welfare. For example, section 92.046 of the Oregon Revised Statutes, which governs the adoption of regulations approving land partitions, summarily states, "[t]he governing body of a county or a city may . . . when reasonably necessary to accomplish the orderly development of the land . . . and to promote the public health, safety and general welfare of the county or city, adopt regulations or ordinances governing approval." As an initial step, such an understanding of the police power requires an understanding of what these terms mean. Although these terms are set in the context of a statutory scheme, local and state governments continue to use these terms without defining their boundaries, perhaps by design.

On the other hand, judicial interpretations of valid exercises of legislative authority fail to provide clear rationales that offer concrete guideposts of this power's scope. The Oregon Supreme Court has called definitions of the police power "inexact and unsatisfactory."[89] Moreover, the U.S. Supreme Court in *Berman v. Parker* recognized that "[a]n attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts."[90] Essentially, the individual terms constituting the police power are, at best, abstractions and the judiciary must address them through the process of statutory interpretation.

---

85 Linde, *supra* note 75, at 135.

86 *Id.* at 147.

87 *Id.*

88 *See id.* at 152 (concluding that "an inquiry into the validity of local government action not only can but must involve a determination of that government's legal authority, if not explicitly then nevertheless by unspoken implication").

89 Stettler v. O'Hara, 139 P. 743, 748 (Or. 1914), *aff'd* Simpson v. O'Hara, 243 U.S. 629 (1917).

90 Berman v. Parker, 348 U.S. 26, 32 (1954).

IV. STATUTORY INTERPRETATION OF MEASURE 37'S PUBLIC HEALTH AND SAFETY EXEMPTION

Measure 37 provides that certain land use regulations will be exempt and will continue to apply to land. In particular, Measure 37 provides that land use regulations "[r]estricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations"[91] will continue to apply. Under the express text of this exemption, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations relate to the public health while fire and building codes relate to the public safety. Solid or hazardous waste and pollution control regulations seem to fall under both the public health and safety. But, does the text suggest that this is not an exhaustive list of public health and safety regulations, and if so, how far can the court and the government interpret these terms without under-regulating or over-regulating? The state and some local governments have recognized the exemption as a tool to prevent development and some are already applying this exemption on a more consistent basis relative to the other exemptions.[92] However, the full utility of the exemption is still ambiguous.

To date, neither the legislature in the Oregon Revised Statutes, nor the courts through case law have precisely defined "public health" or "public safety."[93] Consequently, the state, Metro, and local governments have not definitively concluded the boundaries or contours of the public health and safety exemption. Thus far, the government has been careful in its application of the exemption and has not extended its interpretation much farther than the exemption's express provisions. This may be in part due to the uncertainty of how far the government can toe the line before it impermissibly negates the voters' intent in passing Measure 37. Initial questions about the exemption have included whether Measure 37 exempts setbacks from forested land or whether it exempts building limitations due to limited groundwater resources.[94] A useful method to unpack the statutory meaning behind the public health and safety exemptions is to discuss what each term—public health and public safety—separately encompasses under the methodology in *PGE v. BOLI*.[95] The exemption is distinct because it omits "welfare" from the traditional triad and leads the court, which

---

91 Measure 37, *supra* note 4, § (3)(B).

92 *See* Sullivan, *supra* note 48, at 144.

93 The Oregon Revised Statutes fail to define these terms even though many statutory provisions refer to them. For example, section 92.046 of the Oregon Revised Statutes provides, "The governing body of a county or a city may . . . when reasonably necessary to accomplish the orderly development of the land . . . and to promote the public health, safety, and general welfare of the county or city, adopt regulations or ordinances." Or. Rev. Stat. § 92.046 (2005). The statute mentions the different elements of the police power without giving guidance as to what regulations apply. *See id.*

94 GEORGETOWN ENVTL. LAW & POL'Y INST., *supra* note 24, at 4 (citing Ezra Casteel, *Measure 37 Claims Could Cause Water Shortage*, LINCOLN CITY NEWS GUARD, May 10, 2005).

95 859 P.2d 1143 (Or. 1993).

ultimately will resolve disputes regarding this exemption, to question the significance of the omission and the specific inclusion of "public health and safety."

A. The PGE v. BOLI *Methodology*

The judicial system in Oregon applies the methodology presented in *PGE v. BOLI* to questions of statutory interpretation. To determine the legislative intent in enacting a particular statute[96] under *PGE v. BOLI*, the court applies a three-level framework. At the first level, the court evaluates the text and context of the statute.[97] At the second level, the court considers the legislative history of the statute to ascertain legislative intent.[98] Finally, at the third level, the court applies general maxims of statutory construction.[99] Generally, the question of the intent of an initiative such as Measure 37 is the same as for a statute created by the legislature; however, the focus regarding an initiative is the voters' intent upon passing the initiative.[100]

At the first level, judicially and statutorily adopted rules of statutory construction guide the interpretation of the text to ascertain legislative intent.[101] Statutory rules of construction caution the court not "to insert what has been omitted or to omit what has been inserted" and to give effect to all adopted provisions.[102] Additionally, a well-known judicially developed rule is to give words their "plain, natural, and ordinary meaning."[103] Statutory provisions do not exist in a vacuum; the court also considers the text in context of other provisions in the same statute or related statutes at this first level.[104] Only if the first level of analysis is not fruitful does the court move to the second level of analysis.[105]

The second level of the *PGE v. BOLI* methodology examines the legislative history of the provision in conjunction with the text and context to determine legislative intent.[106] The legislative history includes the information available to the voters at the time of the measure's adoption that exhibits what the voters understood the measure to mean.[107] Echoing the conclusion of the first level, the court can only advance to the last level of inquiry if the second level fails to provide a clear understanding of legislative intent.[108]

---

96 OR. REV. STAT. § 174.020 (2005).

97 PGE v. BOLI, 859 P.2d at 1145–46.

98 *Id.* at 1146.

99 *Id.*

100 RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 18–19 (2002).

101 PGE v. BOLI, 859 P.2d at 1146.

102 OR. REV. STAT. § 174.010 (2003).

103 PGE v. BOLI, 859 P.2d at 1146.

104 *Id.*

105 *Id.*

106 *Id.*

107 Letter from Stephanie Striffler, *supra* note 26, at 2.

108 PGE v. BOLI, 859 P.2d at 1146.

The final level of analysis employs maxims of statutory construction if the legislature's intent remains ambiguous after reviewing the text, context, and legislative history.[109] At the third level, the maxims address non-textual considerations, including content, in contrast to the first-level maxims that address textual considerations.[110] Commonly used canons at the third level include an assumption that the legislature did not intend to create an absurd result and that the legislature intended a construction that avoided constitutional issues.[111] However, Judge Jack Landau notes that statutory canons may have limited utility because "[m]any maxims do not accord with any realistic notion of how legislatures actually behave."[112]

1. Level One—Text

Justice Frankfurter once said, "Read the statute. Read the Statute. Read the Statute."[113] At the first level of analysis, the court will examine the text and context of Measure 37, which exempts land use regulations that protect the public health and safety. The plain language and the context of Measure 37 demonstrate that the voters most likely intended the public health and safety exemption to be read more broadly than only the five stated types of exempted land use regulations. This intent has its limits, which has yet to be explored by the courts. However, the courts, the state, Metro, and local governments can expect parties to litigate the application of this exemption in the near future, at which time the court will most likely resolve issues of statutory interpretation at the first level. Thus, the court will find it unnecessary to proceed to level two to consider the legislative history of Measure 37. Even if the court considers the legislative history, it does not clearly demonstrate that the voters meaningfully contemplated the exemptions when they passed the initiative.

Measure 37 does not define either "public health" or "public safety," which triggers the court's initial inquiry into the "plain, natural, and ordinary meaning"[114] of these phrases. The text provides the best evidence of legislative intent.[115] As an initial step, the court typically refers to the dictionary—specifically Webster's Third International Dictionary—to discern the plain meaning. The term "public" qualifies health and safety to limit their scope to regulations protecting the health and safety of members of the general community and not the private interests of individuals themselves. Webster's Third International Dictionary defines "health" as "the

109 *Id.*

110 Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILLAMETTE L. REV. 1, 57–58 (1996).

111 Jack L. Landau, *PGE v. BOLI: Awkward Adolescence or on the Smooth Path to Maturity?*, *in* Day with the Supremes, Crossroads: The Oregon Supreme Court and Appellate Practice in the 21st Century, Oregon Law Institute of Lewis and Clark Law School, Oct. 13, 2006. ch. 2, at 13 (available in the Paul L. Boley Law Library at Lewis and Clark Law School).

112 Landau, *supra* note 110, at 58.

113 BROWN & BROWN, *supra* note 100, at 38–39.

114 PGE v. BOLI, 859 P.2d at 1146.

115 *Id.*

condition of an organism or one of its parts in which it performs its vital functions normally" and "vitality [and] prosperity."[116] Thus, the common usage of the term "public health" includes the well-being of a community and its members. In addition, a common understanding of the word "safety" is "freedom from exposure to danger: exemption from hurt, injury or loss."[117] Similarly, the plain meaning of "public safety" includes protecting the community's well-being from harm. These terms read together or read alone remain too vague to construe a precise meaning because they do not allow the court to fully characterize what types of actions further these values. At the very least, Measure 37 imparts an understanding that land use regulations protecting the general community from physical or physiological harm will be exempt. Dictionary definitions serve a "useful starting point" because they offer what the voters might have understood,[118] but dictionary definitions are not necessarily conclusive of what the voters actually understood.[119]

Many regulations serve multiple purposes including protecting both the public health *and* the public safety. The Governor's office generally interprets laws that protect the public health *and* safety as laws that are reasonably related to the protection of either public health *or* safety, or both goals.[120] Consequently, the use of the word "and" between health and safety in the Measure 37 exemption does not require that a particular regulation protect both of these purposes to be exempt.[121] Additionally, there is inherently more flexibility in implementing the Measure 37 exemption because exempted land use regulations only need to be reasonably related[122] to the protection of public health and safety. In its proper application, the state, Metro, and local governments should be able to construe the exemption to encompass a broad range of land use regulations so long as they serve to protect the public health and safety.

a. "Such As"

The remaining portion of the provision sheds some light on the limits of what constitutes measures to protect the public health and safety. The phrase "such as" follows "public and safety" and suggests a non-inclusive list. The use of "such as" suggests that subsection (3)(B) of Measure 37 does not constrain the list of exempted land use regulations either in its listing or in the types of sub-categories that may fall under the noted types of regulations. "Such as" links the category of public health and safety regulations to regulations that are similar in kind and that elaborate types of regulations falling under the category. "Such as" does not suggest that the

116 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1043 (Philip Babcock Gove ed. 1986).
117 *Id.* at 1998.
118 State v. Holloway, 908 P.2d 324, 327 (Or. Ct. App. 1995).
119 Landau, *supra* note 110, at 2–6.
120 OFFICE OF GOVERNOR KULONGOSKI, *supra* note 28, at 6.
121 *Id.*
122 *Id.*

state, Metro, and local governments are limited solely to types of listed regulations, but that they are only bound by the regulations that relate to public health and safety. A stricter interpretation that confines the types of exempted regulations solely to this listing would omit regulations that also protect the public health and safety. For example, building regulations addressing crime concerns would be omitted even though these regulations protect the public safety. Thus, "such as" is most likely read to be expansive and not restrictive here.

b. Ejusdem generis

Courts often use the textual canon *ejusdem generis*, meaning "of the same class," to discern intent; this canon may be instructive in deciphering the breadth of the health and safety exemption.[123] *Ejusdem generis* is a variation on the maxim *noscitur a sociis*, meaning "of the same kind."[124] Like all maxims, they serve to determine the correct construction of a statute that is susceptible to more than one interpretation.[125] Judge Landau points out that textual canons "frequently cannot be squared with the known realities of the legislative process or simply do not make sense,"[126] yet this has not stopped the judiciary from using canons to interpret statutes.[127] *Ejusdem generis* is used most commonly when a general term (e.g., "and others") occurs at the end of a listing of specific items[128] and the maxim relies on making inductive inferences to decide the scope that the words incorporate.[129]

The doctrine also applies when specific words follow general words, which describes the situation of the public health and safety exemption because the exemption elaborates on its meaning by listing specific types of applicable regulations. These regulations fall into five types: fire codes; building codes; health and sanitation regulations; solid or hazardous waste regulations; and, pollution control regulations.[130] In this situation, the doctrine only applies the general term to things that are similar to those listed.[131] Regarding the public health and safety exemption, the challenge is how narrowly to interpret these categories of regulations. *Ejusdem generis* is a rule of strict construction[132] and other regulations that are not listed in Measure 37 must be similar in nature to those already listed—fire and

123 BROWN & BROWN, *supra* note 100, at 74.

124 NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 47:17 (6th ed. 2000).

125 R. De J. R., Note, *Statutory Construction—Doctrine of Ejusdem Generis*, 17 VA. L. REV. 511, 511 (1930).

126 Landau, *supra* note 110, at 25.

127 BROWN & BROWN, *supra* note 100, at 68–69.

128 *Id.* at 74.

129 Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1208 (2001).

130 Measure 37, *supra* note 4, § (3)(B).

131 SINGER, *supra* note 124, § 47:17.

132 R. De J. R., *supra* note 125, at 515.

building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations.[133] As the Governor's office notes, "[a]ll pollution control laws are included within the exception, but in order to be a 'pollution control law' within the meaning of the measure, the law must have a reasonable relationship to pollution control, e.g., the law will not qualify merely because of how it is labeled."[134]

Courts recognize the usefulness of *ejusdem generis* "as a drafting technique designed to save the legislature from spelling out in advance every contingency in which the statute could apply."[135] David Hunnicutt of OIA also recognizes the difficulty created by listing only a few exempt regulations, thus making a determination of the scope of the exemption "an impossible task, given the variety of regulatory schemes and the multi-purpose land-use regulations created in our society."[136] Under this doctrine, related statutes that direct appropriate uses of land can include erosion and sediment control regulations, floodplain regulations, ridgeline protections, storm water and wastewater regulations, and steep slope regulations, all of which DLCD already interprets as exempted land use controls. Although *ejusdem generis* demands a narrow construction, environmental protections such as wetlands regulations can be exempt through local pollution control regulations. Additionally, environmental regulations specifying vegetation types and masses[137] could be exempt if they relate to erosion control or flood hazards. However, regulations protecting scenic resources would not fall under the exemption, as the court in *Berman v. Parker* stated.[138]

2. Level One—Text in Context

Next, courts turns to the statutory context to further support a reading of the text and discern the voters' intent. There are numerous types of statutory context under *PGE v. BOLI*, including other provisions of the same statute,[139] other statutes on the same general subject,[140] preexisting common law,[141] and the regulatory context.[142] The court's consideration of the statutory context is an integral step in the methodology because it "examines whether the meaning found in the dictionary is borne out by its

133 Measure 37, *supra* note 4, § (3)(B) (2004).

134 OFFICE OF GOVERNOR KULONGOSKI, *supra* note 28, at 6.

135 SINGER, *supra* note 124, § 47:17.

136 Hunnicut, *supra* note 14, at 42.

137 John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 380 (2002).

138 *See* Berman v. Parker, 348 U.S. 26, 33–36 (1954).

139 Denton v. Denton, 951 P.2d 693, 697 (Or. 1998).

140 State v. Carr, 877 P.2d 1192, 1194 (Or. 1994) ("Context includes other related statutes.").

141 *Denton*, 951 P.2d at 697.

142 *See, e.g.*, Fisher Broad., Inc. v. Dep't of Revenue, 898 P.2d 1333, 1339 (Or. 1995) (considering the regulatory regime in which the statute was enacted); City of Salem v. Salisbury, 5 P.3d 1131, 1137 (Or. Ct. App. 2000) (considering the statutory frameworks in which the laws in question were enacted).

use in context."[143] Turning to the context also gives the court the necessary tools "to produce a harmonious whole."[144]

In the context of the statute, a more open reading of subsection (3)(B) of Measure 37 and the terms "public health and safety" is plausible when read in relation to subsection (3)(A). Subsection (3)(A) exempts regulations prohibiting public nuisances and notably states, "[t]his subsection shall be construed narrowly."[145] The drafters inserted this language to expressly limit the scope of applicable land use regulations relating to public nuisances. The drafters did not articulate this express restriction in the public health and safety exemption, which they certainly could have done. The omission here is notable because the "use of a term in one section and not in another section of the same statute indicates a purposeful omission."[146] Furthermore, the court may not assume that other subsections should be construed narrowly as well because the court may not "insert what has been omitted, or . . . omit what has been inserted"[147] in the process of ascertaining intent.

a. Public Health

Preexisting common law and the regulatory context provides some clarity as to what the voters may have intended the words "public health" to include. Public health concerns vis-à-vis land use generally refer to impending or immediate threats to humans caused by the land use—in part or in whole—that could severally hamper quality of life.[148] Public health also may be expansive enough to include more environmental regulations as they relate to the public health.

Regulations protecting the public health generally do not regulate against benign uses, but rather, uses that pose a real or potential threat to the public health. Regulating against benign uses would fail to be a proactive exercise in legislating to protect the public health. In *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, the court noted that issues of the public health did not logically relate to the siting of generally benign uses.[149] In that case, the court considered whether the city impermissibly used its police powers to deny appellant's permit to build a church in a residential zone.[150] The court summarily ruled against the city's ability to prohibit the siting of the church as protecting the public health, noting that "it cannot be logically

143 Landau, *supra* note 110, at 34.

144 Lane County v. Land Conservation & Dev. Comm'n, 942 P.2d 278, 283 (Or. 1997).

145 Measure 37, *supra* note 4, § 1 (3)(A).

146 PGE v. BOLI, 859 P.2d 1143, 1146 (Or. 1993) (citing Emerald People's Util. Dist. v. Pacific Power & Light Co., 729 P.2d 552, 560 (1986)).

147 OR. REV. STAT. § 17.010 (2005).

148 *See, e.g.*, West Side Sanitary Dist. v. LCDC, 614 P.2d 1141, 1142 (Or. 1980) (relating public health to limiting "propagation of communicable or contagious disease . . . ."); Citadel Corp. v. Tillamook County, 9 Or. LUBA 61, 65 (1983) (stating that "Health considerations involve water, sanitation, air quality and other possible pollutants or wastes").

149 Milwaukie Co. of Jehovah's Witnesses v. Mullen, 330 P.2d 5, 17 (Or. 1958).

150 *Id.* at 17–18.

argued that a church building or its uses would adversely affect the health of the community."[151] The court confined its inquiry and concluded that this issue was more properly related to the public welfare.[152]

Mullen suggests that regulations to protect the public health refer to land uses that would protect against uses that engender behavior that is beyond benign. This provides the court with one end of the public health spectrum. There is also a distinction here between regulations protecting the public welfare and those protecting the public health. Public health regulations appear to focus on the physical and physiological harms that government must protect against while public welfare regulations tend to focus on promoting generally benign activities that benefit all.

The public health and safety exemption expressly states that Measure 37 will not apply to health and sanitation laws, which the government can reasonably interpret to include regulations to suppress potential sources and triggers of diseases. The court in *West Side Sanitary Dist. v. LCDC*[153] concluded that "a danger to public health exists because of conditions 'which are conducive to the propagation of communicable or contagious disease producing organisms.'"[154] Sanitation, solid waste, and hazardous waste regulations, which Measure 37 recognizes, are obvious ways that the government can protect the public health from toxins, but the government also may be able to exempt land management regulations that suppress disease. The state, Metro, and local governments should be able to expand the exemption beyond immediate sources of disease because public policy supports the benefits gained from eliminating disease.

The public health as it relates to environmental protection presents much ambiguity because the government generally promulgates environmental laws with the primary goal of resource protection, although the government considers public health issues in environmental protection.[155] Measure 37 exempts pollution control regulations as protecting the public health, which can reasonably include water and air quality protections. [156] DLCD already exempts regulations protecting water quality under statewide planning Goal 6 in its final staff reports for state Measure 37 claims.[157] Some protections under the Clean Water Act[158] and

151 *Id.* at 16.

152 *Id.*

153 614 P.2d 1141 (Or. 1980).

154 *Id.* at 1142.

155 *See* EPA, Looking Backward: A Historical Perspective on Environmental Regulation, http://www.epa.gov/history/topics/regulate/01.htm (last visited Jan. 27, 2008) (noting that "[t]he predominant climate from which EPA's predecessor programs arose was, in fact, not ecological at all, but firmly entrenched in decades-old public health traditions").

156 Citadel Corp. v. Tillamook County, 9 Or. LUBA 61, 65 (1983). LUBA interprets "health" considerations to include water, sanitation, air quality, and other possible pollutants or wastes. *Id.*

157 Or. Dep't Land Conservation & Dev., Ballot Measure 37 Claim for Compensation: Final Staff Report and Recommendation, Claim No. M120129, at 5 (June 3, 2005) (for claimant Bettie Frye), *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M120129_Frye_Final_Report.pdf.

158 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

Clean Air Act[159] may already be exempt under subsection (3)(C) of Measure 37, which exempts land use regulations that must comply with federal laws. What will be more problematic, however, is for the state, Metro, and local governments to decide which environmental regulations, beyond the area of pollution control, will continue to apply under the exemption. This will require the state, Metro, and local governments to determine as a threshold matter if the environmental regulation is reasonably related to the public health or public safety.[160] Open space regulations may fall under the public health,[161] as there is some evidence that the availability of open space influences and encourages physical activity in humans.[162] Although this connection between open space regulations and the public health may be tenuous, the state, Metro, and local governments should give potential exemptions serious consideration because they should not be allowed to easily pass as entirely nonexempt.

b. Public Safety

The public safety is a distinct concern from the public health. Nonetheless, they share an intimate link and both should be read more expansively than the express wording in Measure 37. The government's power to regulate broadly for the protection of the public safety is of paramount importance because, in some cases, without government regulation landowners may take no precautions to protect human life from certain land use activities that produce or may produce disastrous results. Judicial interpretations of the public safety and the context of statewide planning goals 7 (relating to areas subject to natural disasters and hazards) and 11 (relating to public facilities and services) should guide the court to find a broad interpretation of the public safety.

Transportation and street design regulations should continue to apply under Measure 37 because of their role to protect public safety. These kinds of regulations facilitate efficient patterns of movement and allocate the appropriate amount of space to transportation system users. These regulations have the intended effect of allowing all users to interact in the same area at a minimum level of friction. In particular, regulations that provide for adequate street access in new subdivisions for emergency vehicles and services[163] should be exempt since the continued application of such regulations will ensure proper access.

159 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000).

160 OFFICE OF GOVERNOR KULONGOSKI, *supra* note 28, at 6.

161 *But cf.* Hunnicutt, *supra* note 14, at 42 (2006) (arguing that open space laws may be desirable for the public but are not likely to protect the public health).

162 LAWRENCE FRANK, SARAH KAVAGE & TODD LITMAN, SMART GROWTH BC, PROMOTING PUBLIC HEALTH THROUGH SMART GROWTH 24, *available at* http://www.smartgrowth.bc.ca/Portals/o/Downloads.SBBC_Health%20Report%20FINAL.pdf (last visited Jan. 27, 2008).

163 *See, e.g.*, Lee v. City of Portland, 3 Or. LUBA 31, 40 (1981).

In *Liles v. City of Gresham*,[164] LUBA addressed a proposed street system as a safety concern. The city found that plans for a major housing development would increase traffic on an existing local street and essentially turn it into a primary access road to serve the development.[165] LUBA agreed with the city's finding that the continuously steep grade of the proposed street design increased the potential hazards, especially during inclement weather conditions.[166] The city appropriately prohibited the proposed development because its safety issues violated the city's "Trafficways Policy" in the comprehensive plan, even though the development itself met specific development standards.[167] Furthermore, the court found that traffic on a continuously steep grade would create significant safety concerns.[168]

The consideration of street design plays a considerable role in public safety because thoughtful design decisions can circumvent potentially hazardous conditions, including decisions to avoid funneling traffic onto streets with steep grades. Particularly during inclement weather or emergency situations, land use regulations guiding street design and transportation planning, based on factors like topography, can have a major impact on emergency response times and safe access. Additionally, the public safety can reasonably expand to include other traffic concerns such as bicycle and pedestrian concerns. Standards providing for pedestrian walkways and bike paths, such as regulations defining sidewalk and bike lane widths, should continue to apply because they have a direct impact on protecting people who choose alternative transportation modes.

Regulations protecting against natural hazards can also be justified as exempt because without such regulations in place, situations jeopardizing the public safety are likely to arise. Statewide planning Goal 7 will also be implicated if state and local governments do not continue to apply regulations protecting against the effects of natural hazards and disasters. In DLCD's determinations of state claims, the agency has already exempted regulations that implement statewide planning Goal 7 and namely those that prohibit development in floodplain areas,[169] steep slopes

164 10 Or. LUBA 125 (1984).

165 *Id.* at 129.

166 *Id.* at 130.

167 *Id.* at 132. In *Liles v. City of Gresham*, LUBA held that the city's Trafficways Policy in the comprehensive plan could not deny development that had met the requirements of the city's development code. LUBA had relied on *Philippi v. City of Sublimity*, 650 P.2d 1038 (Or. Ct. App. 1982), to make their decision, but the Oregon Supreme Court later reversed. Philippi v. Sublimity, 662 P.2d 325, 330 (Or. 1983). The Oregon Court of Appeals remanded *Liles v. City of Gresham* to LUBA to reconsider the case in light of the Supreme Court's reversal. 672 P.2d 1229, 1230 (Or. Ct. App. 1983).

168 *Liles*, 10 Or. LUBA at 129.

169 Or. Dep't Land Conservation & Dev., Ballot Measure 37 Claim for Compensation: Final Staff Report and Recommendation, Claim No. M1118919, at 6 (June 3, 2005) (for claimant Mildred Fergusson), *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M118919_Fergusson_Final_Report.pdf. Some criticize the public health and safety exemption because it can limit development in cases that are socially desirable. One example is the story of a landowner who wished to donate land to Habitat for Humanity, who intended to build new

areas,[170] and areas of unstable soils. Furthermore, LUBA interprets the public safety to include considerations of flooding, geologic hazards,[171] and fire hazards,[172] which the government has long established as a public safety concern.[173] It is imperative that state and local governments continue to apply regulations prohibiting development in areas where natural disasters are foreseeable because of the potential risk for loss of life. Goal 7 recognizes that without appropriate safeguards, severe damage to people and property could occur, which strongly supports the need to continue applying these types of regulations, especially in light of the 1996 floods and the 1993 earthquake.[174] The addition of Measure 37 into chapter 197 of the Oregon Revised Statutes did not upset the existing statutory scheme, which includes the statewide planning goals, thus Goal 7 continues to apply to developments proposed by Measure 37 claimants.

Similarly, the public health and safety exception must also be read in the context of statewide planning Goal 11, which remains part of the regulatory scheme despite Measure 37. Goal 11 requires that local governments plan public facilities and services, such as sewer facilities and fire protection, in a systematic manner that directs efficient growth.[175] Goal 11 also directs local governments to permit the appropriate level of facilities and services in urban and rural areas. The exemption is likely to apply to plans or programs of special districts that provide public facilities and services, such as sanitary authorities,[176] to the extent that their regulations affect land use.[177] While it may be appropriate for the government to require a particular minimum lot size to be serviced by sewer services in an urban

low-income homes on the land. Development of the property was denied for public safety reasons because the property was in a floodplain. However, it is questionable that the homes would have been habitable anyhow because of the flood conditions, which may have been frequently periodic. TODD MYERS, WASH. POL'Y CTR., OREGON'S MEASURE 37 PROPERTY RIGHTS LAW LESSONS FROM THE FIRST ELEVEN MONTHS, Dec. 2005, http://www.washingtonpolicy.org/Environment/PBMyersMeasure37.htm (last visited Jan. 27, 2008).

170 Or. Dep't Land Conservation & Dev., Ballot Measure 37 Claim for Compensation: Final Staff Report and Recommendation, Claim No. M119116, at 6 (June 23, 2005) (for claimants Victor C. & Pamela J. Cobos), *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M119116_Cobos_Final_Report.pdf.

171 Citadel Corp. v. Tillamook County, 9 Or. LUBA 61, 64 (1983).

172 DLCD's final staff reports also reflect that section 215.730 of the Oregon Revised Statutes and section 660 of the Oregon Administrative Rules, division 6 are exempt because they regulate the siting of dwellings in forest zones, which are susceptible to forest fires. Or. Dep't Land Conservation & Dev., Ballot Measure 37 Claim for Compensation: Final Staff Report and Recommendation, Claim No. M129437, at 6 (Nov. 22, 2006) (for claimant Patrick Gisler), *available at* http://www.oregon.gov/LCD/MEASURE37/docs/finals2006/M129437_Gisler_Klamath.pdf.

173 48 Op. Att'y Gen. 27, 29–30 (Or. 1996).

174 Or. Dep't Land Conservation & Dev., *supra* note 169, at 6; *Washington County Mitigation Action Plan: Introduction*, at 2-1 to 2-2, http://www.co.washington.or.us/deptmts/cao/mitigate/pdf/sec_2_community_profile.pdf (last visited Jan. 27, 2008).

175 Land Conservation & Dev. Comm'n (LCDC), Order Adopting Statewide Goals and Guidelines, *In re* Adoption by the land Conservation and Development Commission of Statewide Planning Goals and Guidelines, LCDC Order #1, at 31 (1974) (effective Jan. 25, 1975).

176 OR. REV. STAT. § 450.825 (2005).

177 *Id.* § 195.020.

setting, the same minimum lot size requirement may not be appropriate in a rural setting where septic systems and drain fields are more likely to be common. If the government does not have the ability to continue enforcing the orderly planning of public services and facilities under Measure 37 to direct proper growth, future land use decisions may cause public health and safety problems because the need for critical services will not be enforced. Measure 37 does not require that public facilities and services be in place before development occurs, which strengthens the need for the government to continue applying regulations that satisfy Goal 11 and protect the public safety. This will most likely be true in areas where the proposed level of development is much higher than what currently exists.

Although LUBA and the Attorney General construe Goal 11 to include schools as a public facility in a land use plan,[178] the public health and safety exemption cannot easily apply to schools, and most likely will not. Schools are critically important in the calculation of public services because the availability of school facilities can decide the level of feasible residential development.[179] The decision to develop residential land without considering school facilities is inconvenient for parents of school-age children and is also costly for other school facilities that must absorb an increased student population.[180] However, the government does not generally provide for schools as a means to protect a community's health or safety, and decisions regarding schools tend to involve economic, geographic, and convenience concerns.

A less obvious application of the public health and safety exemption are building regulations and design standards that help prevent crime. In *Homebuilders Association of Metropolitan Portland v. City of Portland*,[181] LUBA upheld a Portland zoning ordinance that required the "main entrance [to be] clearly identifiable from the street to allow ease of access for emergency services" and that "[t]he garage does not create a physical barrier between the living area and the public realm that blocks views of the street from inside the residence."[182] LUBA found that the ordinance promoted the public safety and prevented crime.[183]

Considerations of crime prevention should allow the state, Metro, and local governments to exempt building codes under the notion of protecting the public safety. Structural and landscape designs can have a significant impact on community safety because designs have the ability to create safe spaces. Building regulations and design standards also facilitate community policing because emergencies from inside residences are more likely to be seen by neighbors if views remain unobstructed by the structural design.

---

178 Home Builders Ass'n of Metro. Portland & Century 21 Homes, Inc. v. Portland Metro. Area Local Gov't Boundary Comm'n (*Home Builders I*), 4 Or. LUBA 245, 249 (1981); 38 Op. Att'y Gen. 1956, 1962 (Or. 1978).

179 *Home Builders I*, 4 Or. LUBA at 249.

180 *Id.*

181 37 Or. LUBA 707 (2000).

182 Homebuilders Ass'n of Metro. Portland & Century 21 Homes, Inc. v. City of Portland (*Homebuilders II*), 37 Or. LUBA 707, 722 (2000).

183 *Id.* at 723.

3. Level Two—Legislative History

A court reviewing the public health and safety exemption should be able to find its meaning unambiguous after reading the text in context. However, if the court chooses to consider the legislative history of Measure 37, the court would find that the legislative history is not conclusive. The legislative history would not support a definitive conclusion on either side of the debate that the public health and safety exemption should be read narrowly or broadly because the legislative history does not indicate that the voters even contemplated the exemptions. Sources of legislative history include the explanatory statement and arguments on both sides of the measure presented in the voters' pamphlet[184] as well as news reports and editorials written preceding the measure's passage.[185] The court's consideration of these sources of legislative history "depends on their objectivity, as well as their disclosure of public understanding of the measure."[186]

The voters' pamphlet presents polar arguments on the issue of whether Measure 37 should be passed. Notably, the pamphlet circulated to the public includes a statement from the Chief Petitioners who state that the measure does not prohibit the government from adopting regulations protecting the public health and safety.[187] The Chief Petitioners attempted to clarify what they intended the public health and safety exemption to mean and stated that land use regulations "should not be allowed to rename a land use regulation simply to avoid the protections of Ballot Measure 37."[188] The intention is that not every land use regulation can be swept under the public health and safety exemption.

Curiously though, the Chief Petitioners' statement says that regulations should not be "bootstrapped into the definition of building codes, public health and safety codes, sanitation codes, or public welfare codes, by the courts."[189] Although the chief drafters state a desire to hold the reigns on the public health and safety exemption, their statement expands the types of regulations to include public welfare codes. In addition, the Chief Petitioners' statement expands the understanding of exempted regulations to include traffic safety regulations.[190] Their statement's mention of another type of exempted land use regulation provides further support that this exemption is more elastic than its initial reading.

Despite the Chief Petitioners' explanatory statement, the voters expressed very black and white arguments for and against the measure in an

184 Ecumenical Ministries v. Or. State Lottery Comm'n, 871 P.2d 106, 111 n.8 (Or. 1994).

185 *Id.*

186 *Id.*

187 Dorothy English, Barbara Prete & Eugene Prete, *Argument in Favor*, *in* 1 VOTERS' PAMPHLET: OREGON VOTE-BY-MAIL GENERAL ELECTION NOVEMBER 2, 2004, at 115 (Office of Or. Sec'y of State ed., 2004), *available at* http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf.

188 *Id.* at 116.

189 *Id.*

190 *Id.* at 115.

all or nothing manner. A typical argument for the measure stated that the government has used their regulatory power to take away the sticks in a property owner's bundle of rights.[191] These property owners reduced their argument to saying that Measure 37 "will end this ridiculous game."[192] Land speculators also saw the measure as a carte blanche for development, without thinking about any applicable exemptions. One particular land speculator arguing for the measure's passage stated:

> This measure will eliminate all zoning and environmental protection in properties across Oregon. . . . As Measure 37 can eliminate ALL zoning, we are interested in any property, regardless of current zoning, proximity to schools, or environmental safeguards . . . MEASURE 37: GET YOURS WHILE THE GETTING'S GOOD![193]

Generally, voters who were for the measure did not express a clear awareness of the limits of Measure 37. Although the voters for Measure 37 might have believed that this measure would release them from existing land use regulation, their sentiments cannot be appropriately used to support a narrow construction of the public health and safety exemption since their focus was on how they would be able to develop their land, and not on how the measure might continue to restrict them from developing.

Similarly, the voters against Measure 37 did not express a clear understanding of the exemptions. A typical argument of the voters against the measure was that Measure 37 would "jeopardize the safe guards of zoning."[194] Additionally, another voter stated, "[i]f Measure 37 is in place, you may find the zoning you rely on won't be there to protect you."[195] This voter's belief, which is generally similar to that of other voters expressed in the Voters' Pamphlet, shows voters did not have a strong awareness of the exemptions. Although it is true Measure 37 strips away some of the land use regulations currently in place, the voters did not address what laws would remain in place to protect the public health and safety and what this meant

---

191 As an example, one proponent notes in the Voters' Pamphlet a general frustration in addition to the hurdles in having to establish a takings claim:

> [M]ost people are very careful when they buy property. You check to make sure that you can use your land before paying for it . . . . But what happens when the government changes the rules after you purchase your land, and you can no longer use your property as you had planned? In most cases, you lose. Why? Because a court cannot award you money for the loss of the use of your land until you have submitted enough applications to the government to prove that your land has no value.

David J. Hunnicutt & Family Farm Preservation PAC, *Argument in Favor*, *in* 1 VOTERS' PAMPHLET, *supra* note 187, at 116.

192 *Id.*

193 Peter Bray, *Argument in Favor*, *in* 1 VOTERS' PAMPHLET, *supra* note 187, at 118.

194 Mickey Killingsworth, *Argument in Opposition*, *in* 1 VOTERS' PAMPHLET, *supra* note 187, at 132.

195 John W. Stephens, *Argument in Opposition*, *in* 1 VOTERS' PAMPHLET, *supra* note 187, at 132.

to them. One may be able to attribute the extreme positions to rhetoric, but the usefulness of legislative history to illustrate the voters' intent is minimal.

B. Omission of the "Public Welfare"

Missing from the otherwise familiar "triad" of the police power is direct mention of the public welfare in Measure 37. Subsection (3)(B) of Measure 37 refers to regulations that protect the public health and safety, thus expressly limiting the reach of this statutory provision to something less than the police power because of the deletion of "welfare."[196] Examining the meaning of "welfare" separately and looking at the term in context may give an understanding of what types of regulations are not included for the protection of public health and safety.

The definition of "welfare" alone does not lead to a clear-cut understanding of what constitutes welfare. The ordinary meaning includes "well-being,"[197] and "thriving or successful progress in life."[198] This definition evokes the notion that a broad range of regulations can promulgate the public welfare so long as they protect the public's ability to thrive. Thus, a court is not likely to uphold the purpose of a regulation as protecting the public welfare if the effect of the regulation actually inhibits the well-being of the public. Based on the text, the full extent of this broad range is not known. In addition, the word "public" places the frame of reference of "welfare" to the well-being of the entire community as opposed to the immediate neighborhood.[199]

Even though the public welfare can be separated as a distinct category of values that the police power seeks to protect, does this separation really matter? One may argue that deletion of the word "welfare" in the public health and safety exemption does not greatly change or diminish the scope of regulations that the government would otherwise exercise under its police power.[200] Although the public welfare is not expressly mentioned in the public health and safety exemption, the exemption arguably still appears to embody the goals of protecting the public welfare. Insertion of "welfare" may be redundant because protecting the public health and safety necessarily includes—and is implied in—protecting the public welfare in general. The textual rule against surplusage directs us to "assume that the legislature did not intend any portion of its enactments to be meaningless surplusage."[201] Here the drafters of Measure 37, Oregonians in Action would

196 Measure 37, *supra* note 4, § 3(B).

197 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 116, at 2594 (1986).

198 *Id.*

199 *See* BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION 210–11 (10th ed. 2007) (discussing floating zones, which have no defined boundaries and are used to enable a community to permit specific uses without having to prelist those uses for particular zoning districts).

200 *See* Moriarty v. Planning Bd. of Sloatsburg, 506 N.Y.S.2d 184, 191 (N.Y. App. Div. 1986) (noting that because the public health and safety is exercised to benefit the general welfare, the use of the term "welfare" is redundant).

201 State v. Stamper, 106 P.3d 172, 175 (Or. Ct. App. 2005).

be replacing the legislature. In making this determination, the court would not run afoul of the textual canon to not "insert what has been omitted, or to omit what has been inserted"[202] because protecting the public health and safety is part and parcel of protecting the public welfare.

The public welfare is an amorphous topic that, at the very least, refers to social and economic considerations when viewed in the context of other statutes *in pari materia* and prior judicial interpretations that preceded the enactment of section 197.352 of the Oregon Revised Statutes. The U.S. Supreme Court in *Day-Bright Lighting, Inc. v. Missouri*[203] described the public welfare as "a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another."[204] Similarly, the Oregon Supreme Court in *Semler v. Oregon State Board of Dental Examiners*[205] noted that "[c]ourts, with good reason, have refused to define police power, for to do so might thus limit it to the detriment of the public welfare, in the light of changing social and economic conditions."[206] The court in *Semler* suggested that social and economic factors weighed on the assessment of the public welfare.

After *Semler*, the Oregon Supreme Court made another attempt in *Milwaukie Co. of Jehovah's Witnesses v. Mullen*[207] to identify the scope of the public welfare. In that case, the appellant corporation challenged denial of their permit application to build a church in a single-family residential area.[208] The court held that the city of Milwaukee's zoning ordinance was a proper exercise of the municipality's police power. The court specifically focused on the ordinance's substantial relationship to the public welfare after ruling out that "a church building or its uses would adversely affect the health of the community."[209] Echoing the sentiments of *Berman v. Parker*, the court recognized that the public welfare "baffles attempts to give it precise definition because of its constantly expanding concepts. 'Sometimes it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts.'"[210] *Milwaukie Co. of Jehovah's Witnesses v. Mullen* gives a more concrete idea of what the public welfare has been interpreted to include, even though the concept is still ambiguous in nature. Under the reasoning of this case, Measure 37 will not exempt land use regulations that preserve and protect public convenience, comfort, social order, and prosperity.

The U.S Supreme Court, in the famous case of *Berman v. Parker*,[211] also explored the public welfare concept.[212] In that case, the property owners

202 OR. REV. STAT. § 174.010 (2005).
203 342 U.S. 421 (1952).
204 *Id.* at 424–25.
205 34 P.2d 311 (Or. 1934).
206 *Id.* at 313.
207 330 P.2d 5 (Or. 1958).
208 *Id.* at 8.
209 *Id.* at 16.
210 *Id.* at 17.
211 348 U.S. 26 (1954).
212 *Id.*

sought to enjoin the city's condemnation of their blighted property for redevelopment.[213] The main issue was whether the government's power extended to taking private property to eliminate blight, and then transferring the property to private developers. The Court reasoned that the city's police power was sufficiently broad enough to extend over the appellants' property. The Court specifically stated that "[t]he values [the public welfare] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[214] The public welfare seems to have an "everything but the kitchen sink" meaning so long as it benefits and protects the public.

Berman v. Parker suggests that regulations protecting the public welfare translate to maintaining a certain quality of living. The U.S. Supreme Court interpreted the public welfare to include concerns related to aesthetics, economics, health, and safety, thus regulations protecting these values would also protect the public welfare.[215] The court deferred to the legislature in defining the particular quality of living for their communities.[216]

On its face, Measure 37 does not exempt land use regulations protecting the public welfare and although the concept of welfare can be seen as implicit in the public health and safety, it is likely that the courts and legislature will not extend the exemption's interpretation this far. The Governor's office interprets welfare consistently with prior case law and states that "[t]his exemption likely does not include laws for the protection of economic, social or aesthetic interests (or that aspect of the traditional 'police power' that may be described as 'general welfare')."[217] However, a law that reasonably relates to public health or safety should be allowed "within the exception even if it has some incidental economic, social or aesthetic benefit."[218]

C. The Public Health and Safety Tautology

At one end of the spectrum, a discussion of the public health and safety becomes tautological because of the common understanding of these phrases. The public health and safety relate to concerns that are just that—the public health and the public safety. Measure 37 draws on the common meaning of the public health to exempt obvious categories of regulations, including health and sanitation because they plainly relate to matters of clinical concern. Solid or hazardous waste regulations protect the public

213 *Id.* at 28.

214 *Id.* at 33.

215 *See id.* at 32–33 (noting that "[m]iserable and disreputable housing conditions may . . . suffocate the spirit by reducing the people who live there to the status of cattle . . . [and] make living an almost insufferable burden").

216 *Id.* at 32.

217 OFFICE OF GOVERNOR KULONGOSKI, *supra* note 28, at 6.

218 *Id.*

health since solid or hazardous waste facilities can produce toxics that can trigger diseases.[219] Additionally, fire and building codes unambiguously protect the public safety because without such regulations, the public would have fewer safeguards against injury or loss that may arise from natural hazards or dangerous structural conditions.

However, Measure 37 does not unambiguously direct the state, Metro, and local governments to solely rely on the listed types of exempted public health and safety regulations—all of which fall directly from the tautology of the public health and public safety. Such a directive would result in a unilateral paralysis of the exemption's interpretation and application. At the very least, courts have consistently applied a liberal construction of statutes that protect the public health to maximize their beneficial objectives.[220] The same could be true for the public safety. DLCD already recognizes some flexibility in its final orders for claims and states that final orders from the state do not bar Metro or local public entities from continuing to enforce a land use regulation.[221] This flexibility should discourage Metro and local governments, as well as the state, from automatically reading potential land use regulations that may be exempt under public health and safety as being applicable under Measure 37.

V. PROCEDURAL AVENUES AND THE POTENTIAL FOR PROCEDURAL CHANGE

Under Measure 37, property owners who wish to challenge final orders that continue to apply certain regulations because of the public health and safety exemption may bring those challenges to circuit court.[222] However, property owners who have been denied Measure 37 claims or wish to challenge granted claims, in whole or part, have three options for judicial review. Property owners can file a takings claim in circuit court under section 6 of Measure 37, they can ask a court for a declaratory judgment under section 28.020 of the Oregon Revised Statutes, or property owners can seek a writ of review under section 34.010. The path to defining the rights of property owners and their potential legal obligations under the public health and safety exemption can vary, and each path can produce a different result.

Property owners can file a takings claim in circuit court under Measure 37 where the court will decide whether the government has improperly applied the public health and safety exemption. Under the administrative framework of Measure 37, claimants must have filed state claims arising from land use regulations enacted before Measure 37 became effective with the Department of Administrative Services (DAS) before December 4,

219 OR. REV. STAT. § 466.385 (2005).

220 NORMAN J. SINGER, 3A STATUTES AND STATUTORY CONSTRUCTION § 73:2 (6th ed. 2003).

221 Or. Dep't Land Conservation & Dev., Ballot Measure 37 Claim for Compensation: Final Staff Report and Recommendation, Claim No. M118605, at 2 (Apr. 27, 2006) (for claimant Luethe) (final order), *available at* http://www.oregon.gov/LCD/MEASURE37/docs/finals2006/M118605_Luethe_Multnomah.pdf.

222 Measure 37, *supra* note 4, § 6.

2006.[223] Before a claimant can seek relief from state or local land use regulations, the claimant must have completed any existing state or local procedures determining whether or how the property could be used before seeking judicial review or relief.[224] From the date a claimant files a claim, the state or local government has 180 days to make their determination.[225] However, if a land use regulation continues to apply 180 days after filing a proper claim for compensation, property owners have a cause of action for a taking claim in circuit court.[226] While different levels of government may adopt their own procedures to process Measure 37 claims, those procedures may not be a prerequisite to the filing of a claim in circuit court.[227]

Measure 37 claims can still be made after December 4, 2006, but DAS adopted new administrative rules earlier in 2007 regarding these claims. The new rules[228] amend the previously adopted administrative rules to do three main things: clarify requirements for submitting state claims after December 4, 2006; "require local governments to notify DLCD of pending and adopted permits or other authorizations to allow a use based on a Measure 37 waiver"; and require that both state and local governments must have waived state and local regulations before a claimant can obtain a permit or other authorization before proceeding with a Measure 37 claim.[229]

Measure 37 essentially changes the procedural landscape by redirecting land use appeals away from LUBA. In 1979, the Oregon Legislature established LUBA,[230] granting it exclusive jurisdiction to review consistency between land use decisions and statewide planning goals, comprehensive plans, or land use regulations.[231] LUBA also hears appeals to amendments made to comprehensive plans and land use regulations. LUBA's creation promoted legislative policies of time and cost efficiency, accuracy and consistency, and judicial expertise in land use matters.[232] The Oregon Court of Appeals and the Oregon Supreme Court have jurisdiction to review LUBA's decisions by petition.[233] LUBA essentially displaces the circuit courts from reviewing land use decisions,[234] but circuit courts retain enforcement power "[t]o grant declaratory, injunctive or mandatory relief."[235]

---

223 *Id.* § 5.

224 OFFICE OF GOVERNOR KULONGOSKI, *supra* note 28, at 4.

225 Measure 37, *supra* note 4, § 6.

226 *Id.*

227 *Id.* § 7.

228 OR. ADMIN. R. 660-041 (2007).

229 Or. Dep't of Land Conservation & Dev. 2005–07 Rulemaking, New Rules Regarding Measure 37, http://www.oregon.gov/LCD/rulemaking_2005-07.shtml (last visited Jan. 27, 2008).

230 OR. REV. STAT. § 197.810 (2005).

231 Rebekah R. Cook, *Incomprehensible, Uncompensable, Unconstitutional: The Fatal Flaws of Measure 37*, 20 J. ENVTL. L. & LITIG. 245, 257 (2005).

232 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, 446–47 (2000).

233 *Id.* at 444.

234 *Id.* at 445.

235 OR. REV. STAT. § 197.825(3)(a) (2006).

Measure 37 states that decisions made by the government under this measure are not land use decisions[236] as defined under section 197.015(10) of the Oregon Revised Statutes,[237] thus LUBA does not have jurisdiction over these decisions, including decisions over which regulations will continue to apply under the public health and safety exemption. Instead, claimants will have to file takings claims in circuit court. This aspect of Measure 37 is particularly troubling because decisions regarding which land use regulations fall under the public health and safety exemption would be more appropriately decided by LUBA's expertise.[238] In essence, Measure 37 oversteps the land use decision-making process that LUBA establishes by stating that Measure 37 decisions, including those relating to the public health and safety exemption, are not land use decisions.[239]

LUBA has "exclusive jurisdiction" over land use decisions, but Measure 37 places compensation claims out of its reach, which essentially undermines the policy reasons for LUBA's jurisdiction. The legislature created LUBA to operate an efficient adjudication system and to create consistent decisions.[240] Because the process of determining which land use regulations do or do not fall under the health and safety exemption is essentially the application of a land use regulation, this suggests that these types of determinations are statutory land use decisions over which LUBA generally has jurisdiction, and should have jurisdiction in Measure 37 cases. Moreover, Measure 37 essentially exempts property owners from fulfilling the constitutionally required ripeness requirement to establish a takings claim.[241] This has the effect of allowing property owners to challenge decisions made under the public health and safety exemption without requiring them to make a precise statement proving that the government inaccurately applied the exemption.

In addition to a takings claim, aggrieved persons can either use declaratory judgments or writs of review to define their rights. Property owners may ask for a declaratory judgment in circuit court to resolve their legal rights and define the limits of the public health and safety exemption relative to their case. Property owners with claims that have been affected, in whole or in part, by the exemption as well as parties opposed to a claim's approval can follow this path. Additionally, plaintiffs can file writs of review to review quasi-judicial decisions made by "municipal corporation[s],"[242] which includes cities, counties, Metro, and the state. Writs of review

---

236 The Oregon Court of Appeals recently decided that an "ordinance adopted by a local government that modifies existing zoning ordinances in response to a claim filed under" Measure 37 was not a land use decision. DLCD v. Klamath County, No. A135614, 2007 Or. App. LEXIS 1369, at *1–2 (Or. Ct. App. Oct. 2, 2007).

237 Measure 37, *supra* note 4, § 9.

238 Interview with Darsee Staley, Attorney, Or. Dep't. of Justice, in Portland, Or. (Oct. 21, 2006).

239 Cook, *supra* note 231, at 256.

240 Sullivan, *supra* note 232.

241 Cook, *supra* note 231, at 252–55.

242 OR. REV. STAT. § 34.102(3) (2006).

procedures, similar to LUBA,[243] confine the court to review the record, which is vastly different from the court's ability to hear new evidence in takings claims. Measure 37 claim procedures set by the state, Metro, and local governments are generally designed to review a particular claim in relation to specific criteria, thus these decisions are quasi-judicial; however, blanket waivers may not be classified as quasi-judicial. Plaintiffs can only use the writ of review as their exclusive remedy while those who file declaratory judgments can seek declaratory relief as their primary or alternative remedy.

VI. CONCLUSION

It is a truism that bad and uncoordinated planning will create social and environmental dilemmas. Measure 37 has the effect of opening the door to uncoordinated development despite the foundational land use planning system that has been in place for over thirty years. However, Measure 37 is not a complete free-for-all, and the majority of the voters passed Measure 37 with the intent of placing some limits, albeit ambiguous ones, on future development. The state, Metro, and local governments can use the exemptions of Measure 37 to rein in some of the proposed development by claimants. In particular, the public health and safety exemption is, and will increasingly become a powerful tool to mitigate or deny at least some development proposals, in whole or in part. The state, Metro, and local governments have an incentive to continue applying regulations that promote public health and safety because they serve as a measuring stick of the quality of living.

Neither the Oregon courts nor the legislature have yet to establish the landscape of the public health and safety exemption. At first blush, Measure 37 seems to limit the planning tools available and wrest control from the hands of regulators and into the hands of private landowners; however, using the *PGE v. BOLI* framework for statutory interpretation, the public health and safety exemption belies that idea, at least to some degree. In DLCD's application of the exemption to particular claimants, the agency has exempted specific regulations, like points on a line, including regulations that prohibit building on steep slopes, in floodplains, and in fire hazard areas.

The courts will most likely conclude at the first level in the *PGE v. BOLI* analysis that the exemption can be read more expansively than the types of regulations that are expressly listed in the exemption, based on the text and context of Measure 37. Because social and demographic conditions change over time, there is a strong argument for defining the contours more expansively than what Measure 37 already exempts, but also precisely enough for claimants to know, as a matter of efficiency, what regulations will continue to apply. In the future, the state, Metro, and local governments

[243] *Id.* § 197.835(2)(b) (2006).

should consider making clear statements in the statutes about which statutes they have adopted to protect the public health and safety.

Aggrieved persons and claimants have a few procedural avenues available to them. Each avenue—a takings claim, a declaratory judgment, and a writ of review—has its benefits and pitfalls and each may create a different result based on differences in evidentiary review. Despite the flexibility this may give plaintiffs in pursuing judicial review in circuit court, it would be more appropriate for judicial review of land use decisions to rest with LUBA because of their expertise and efficiency in handling such cases.

Although some cities and counties have discussed the use of "blanket waivers" to address Measure 37 claims, the Attorney General's office does not believe the public entities may adopt them[244] and public entities should be highly discouraged from considering them at all. Blanket waivers allow a jurisdiction to adopt an ordinance that unilaterally waives certain claims. If the state, Metro, or local governments opt to use them, blanket waivers must be given a strict application because of the potentially negative impact on the public health as well as the public safety. In general, wholesale determinations of proper Measure 37 claim are dangerous because they overlook the opportunity to consider potential exemptions that bear a reasonable relationship to the public health and safety.

[244] Letter from Stephanie Striffler, *supra* note 26, at 2, 7–8.