

OREGON AT A CROSSROADS: WHERE DO WE GO FROM HERE?

BY

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Measure 37 threatens to unravel Oregon's system of land-use planning. In the first eleven months, state claims were filed on more than 66,000 acres, asserting the right to develop residential subdivisions and commercial development on farm and forest lands. Because these proposed developments are inconsistent with surrounding land uses, they will significantly alter both the uses and values of neighboring property and surrounding communities.

This essay discusses the history and rationale behind land use planning and zoning regulations to protect property owners from incompatible uses, demonstrating how land use planning protects a region's quality of life and economic prosperity, prevents sprawl, and leads to increases in property values. The essay contrasts these outcomes with those under Measure 37, discussing the measure's legal ambiguities, chilling effect on current community planning efforts, and loss of comprehensive planning opportunities for rural and urban areas. Further, the essay demonstrates how the compensation mechanism under Measure 37 results in windfalls to property owners—not compensation—through exemptions to land use laws that exceed any actual reduction in fair market value (and occur at the expense of their neighbors).

The essay posits that even if Measure 37 is ultimately declared unconstitutional by the Oregon Supreme Court, Oregonians must rebuild a public consensus on equity, fairness, and the rights and responsibilities of property ownership. Noting that repeated runs at the ballot box will not accomplish this balance, the essay identifies two immediate opportunities for Oregonians to address fairness in land use planning: 1) creating a program of transferable development credits, and 2) participating in the newly created Oregon Task Force on Land Use Planning's "Big Look."

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I.	INTRODUCTION	54
II.	WHY PLAN?	55
III.	WHAT THE MEASURE MEANS	58
	A. <i>Meaning of the Measure: Provisions, Exceptions, and Ambiguities</i>	58
	1. <i>Determining Restriction on Use</i>	58
	2. <i>Calculating Reduction in Fair Market Value</i>	59
	3. <i>Waiver</i>	64
	4. <i>Exemptions</i>	65
	5. <i>Ambiguities and Other Difficulties</i>	66
	B. <i>Implications for Land-use Planning in Oregon: Now and Future Chilling Effects</i>	68
IV.	OREGON'S FUTURE	71
	A. <i>Addressing Fairness and "Regulatory Takings": Transferable Development Credits</i>	73
	1. <i>How Do TDC programs work?</i>	73
	2. <i>Application to Measure 37</i>	74
	B. <i>Addressing Community Planning: SB 82 and the Task Force on Land-Use Planning</i>	75
	1. <i>First question: Where should the "Big Look" look?</i>	76
	2. <i>Second question: Who should do the looking?</i>	76
	3. <i>The third question: How should we look?</i>	77
	4. <i>Finally, question four: What should the "Big Look" at?</i>	77
V.	CONCLUSION	77

"What is the use of a house if you haven't got a tolerable
planet to put it on?"

Henry David Thoreau¹

I. INTRODUCTION

With the adoption of Senate Bill 100 in 1973, Oregon became a pioneer in comprehensive land-use planning. Designed to manage population growth, promote economic development, and protect farm and forest lands for resource uses, Oregon's land use planning program has enhanced Oregonians' quality of life. In so doing, we created an Oregon that is more than tolerable; we created an Oregon that has attracted one million people, countless businesses, and the admiration of other states in the last thirty years.²

At the core of Oregon's land-use planning program are its people—of the nineteen goals that guide Oregon's planning objectives, Goal 1 is citizen

¹ HENRY DAVID THOREAU, FAMILIAR LETTERS OF HENRY DAVID THOREAU 416 (F.B. Sanborn ed., 1894).

² Since 1970, Oregon's population has increased by 1.5 million, one million of which is the result of net migration. POPULATION RESEARCH CTR., PORTLAND STATE UNIV., OREGON POPULATION REPORT 6 (2004), available at http://www.pdx.edu/media/p/r/prc_2004_Population_Report.pdf.

involvement. Through the actions of individual Oregonians, businesses, and local and state governments, Oregon has achieved remarkable successes. Uncoordinated and leapfrog development has been stopped, providing opportunities to build and strengthen livable communities. Agricultural and forest lands that the rest of the nation has lost to urban and rural sprawl are the base of a growing and sustainable economy for family farmers, ranchers, and timber owners. Access to scenic and natural areas—the beaches, mountains, high desert, and rivers—has been protected.

Over the past thirty years, land-use planning in Oregon has evolved, but its purpose remains the same: to protect the characteristics that make Oregon unique and a place we want to call home, even as the state continues to grow.

Measure 37 and the regulatory takings movement threaten to unravel these accomplishments. As of October 1, 2005, some 2,500 claims had been filed with the state and local governments.³ Twelve hundred of those claims have been filed with the state seeking \$2.2 billion in payments,⁴ or—in the alternative—the right to build thousands of houses and millions of square feet of commercial development on farm and forest lands to the detriment of those who surround them.

II. WHY PLAN?

Responsible land-use planning meets the needs of its community by protecting rural lands and improving the built environment within towns and cities. By containing large-scale economic development (other than natural resource-based industries such as agricultural and timber production) within urban growth boundaries and rural development zones,⁵ responsible land-use planning can reap the benefits of growth without destroying communities or the countryside. Investments in infrastructure are concentrated, saving taxpayer dollars and increasing livability.⁶

Land-use planning embraces the creative pragmatism that has attracted people to Oregon since the days of the Oregon Trail. Oregon, like many other states, has natural beauty: the mountains, beach, and high desert. What separates Oregon from other states are the decisions we make to preserve

³ Laura Oppenheimer, *Judge Razes Measure 37 Land Law*, OREGONIAN, Oct. 15, 2005, at A9.

⁴ Measure 37 borrows the term “just compensation” from takings jurisprudence. However, Measure 37 does not actually address takings under the 5th Amendment of the U.S. Constitution. To avoid confusion, I have used the term “payment” instead of “just compensation” to describe the remedy prescribed for claimants under Measure 37.

⁵ In Oregon, this would primarily include unincorporated communities.

⁶ See, e.g., Robert W. Burchell, *Economic and Fiscal Impacts of Alternative Land-Use Patterns*, in LAND USE DECISION MAKING—ITS ROLE IN A SUSTAINABLE FUTURE FOR MICHIGAN 1, 13 (1996) (finding among others, that roads in planned developments are 25% cheaper, schools are 5% cheaper, and utilities are 15% cheaper); J. DIXON ESSEKS ET AL., FISCAL COSTS AND PUBLIC SAFETY RISKS OF LOW-DENSITY RESIDENTIAL DEVELOPMENT ON FARMLAND: FINDINGS FROM THREE DIVERSE LOCATIONS ON THE URBAN FRINGE OF THE CHICAGO METRO AREA (1999), <http://www.aftresearch.org/researchresource/wp/98-1/wp98-1.html> (finding that low-density “scatter” developments on farmland lead to increased costs for public safety, education, roads, and utilities).

our home. The Beach Bill, Bottle Bill, and Oregon Land-Use Planning Act, are all examples of a deep land ethic and willingness to do things differently for an improved today and a better tomorrow.

Oregonians recognized early that protecting farm and forest lands was essential to preserving the state's agricultural and timber economies. We also realized that, without planning and reasonable regulation, our cities and towns could follow the path of other American cities and become places of urban blight, rather than livable communities.

Oregon has achieved much of what it set out to do in 1973: protect farm and forest lands and stop urban sprawl. Over fifteen million acres are protected for agricultural uses, and agriculture remains a growing economy. According to the most recent Natural Resources Inventory (NRI), between 1992 and 1997, Maryland lost 7.5% of its agricultural land base, Pennsylvania 6.5%, California 3.7%, Washington 1.6%, and Idaho 1.4%, compared with barely 1% in Oregon.⁷ At Oregon's request, the NRI differentiated between farmland in exclusive farm use zones and farmland within urban growth boundaries and rural zones where development is allowed. That analysis showed that 72% of the farmland converted to urban uses was already within urban growth boundaries and rural development zones.⁸

Between 1978 and 1992—all years in which the Oregon land-use planning program was in effect—Washington County, Oregon welcomed 40,000 more people than nearby Clark County, Washington. Yet an analysis of U.S. Census of Agriculture data during that period shows that Clark County lost 6,000 more acres of farmland than Washington County.⁹ As significant, per farm income in Clark County *dropped* by ten percent during that period; in Washington County, it *increased* by thirty-six percent.¹⁰ Today, Oregon agriculture contributes \$12 billion to the Oregon economy—second only to high-tech as an industry cluster—amounting to ten percent of Oregon's gross state product.¹¹

Oregon's land-use planning program has controlled sprawl and checkerboard development patterns common to many other urban areas across the United States. Nationwide, between 1982 and 1997, the United States grew in population by seventeen percent, but the amount of urbanized land area grew by 47%.¹² In Minneapolis/St. Paul, the population increased by

⁷ Richard P. Benner, Connecting the Dots: Remarks at the 1000 Friends of Oregon Annual Citizens Conference (Dec. 7, 2002), <http://www.friends.org/resources/bennerconf02.html> (last visited Jan. 22, 2006).

⁸ *Id.*

⁹ *Id.* (this analysis, conducted by 1000 Friends of Oregon, was based on data from the 1978, 1982, 1987, and 1992 Censuses of Agriculture for Oregon and Washington conducted by the U.S. Department of Commerce).

¹⁰ *Id.*

¹¹ Katy Coba, Remarks at the Oregon Banker's Association (Oct. 20, 2005), http://egov.oregon.gov/ODA/news/do_speech_051020.shtml (last visited Jan. 22, 2006). Note also that while timber harvests on federal lands dropped dramatically in the 1990's, Oregon remains the nation's leading producer of forest products. STUART ALLAN ET AL., ATLAS OF OREGON 74 (William G. Loy ed., 2d ed. 2001).

¹² WILLIAM FULTON ET AL., WHO SPRAWLS MOST? HOW GROWTH PATTERNS DIFFER ACROSS THE U.S. 4 (2001), available at <http://www.brookings.edu/es/urban/publications/fulton.pdf>.

25% between 1982 and 1997, but the urbanized land area increased by more than 60%.¹³ In the Portland/Vancouver census area, the urbanized land area increased by 49% from 1982 to 1997, but the population increased by 32%.¹⁴ Yet, even while Portland sprawled less than other cities:

[T]he increase in density—from 3,500 people per square mile to 3,800—was so incremental that it left most Portlanders with about as much elbow room as they had a decade ago. Heavy infill was concentrated in such a small number of areas that nearly 800,000 of the 1.4 million people living in the Portland area in 1990 saw no change in the density of their neighborhoods.¹⁵

Where the national trend showed a loss of office space in central cities, Portland's grew. Between 1979 and 1999, central cities' share of office space within a region shrank from 74% to 58%.¹⁶ Across the largest one hundred metropolitan areas, an average of only 22% of people work within three miles of the city center.¹⁷ But, Portland is among the thirty cities with dense employment (above 25%),¹⁸ and Oregon remains an attractive environment to both businesses and employees. The cost of doing business is low in Oregon (sixteenth lowest in a national ranking),¹⁹ and 40% of new residents cite "quality of life" as a major reason for moving to the state.²⁰

After thirty years of a significant increase in population, much of Oregon has prospered from managed growth while protecting our communities, agricultural and forest land base, and the scenic and natural areas that make Oregon unique. What many say drew them to Oregon in the first place—an hour from the beach, an hour from the mountains—remains true today.

The passage of Measure 37 represents none of this legacy. What has been Oregon's civic nature to act for the good of the community has been relegated to nothing more than the worst of individualism and selfishness: what's in it for me, not how do I make my community better.

¹³ *Id.* at app. B.

¹⁴ *Id.*

¹⁵ Bill Graves & Steve Suo, *A Decade of Orderly Growth*, OREGONIAN, Apr. 8, 2001, at A01.

¹⁶ ROBERT E. LANG, OFFICE SPRAWL: THE EVOLVING GEOGRAPHY OF BUSINESS 1 (2000), available at <http://www.brookings.edu/es/urban/officesprawl/Lang.pdf>.

¹⁷ EDWARD L. GLAESER ET AL., JOB SPRAWL: EMPLOYMENT LOCATION IN U.S. METROPOLITAN AREAS 2-3 (2001), available at <http://www.brookings.edu/es/urban/publications/glaeserjobsprawl.pdf> (30.26% of Portland's employment is within three miles of the city center).

¹⁸ *Id.* at 3; see also NW. ENVT. WATCH, THE PORTLAND EXCEPTION: A COMPARISON OF SPRAWL, SMART GROWTH, AND RURAL LAND LOSS IN 15 U.S. CITIES 4 (2005), available at http://www.northwestwatch.org/scorecard/PDX_sprawl_final.pdf (for every 100 people added to Portland's metropolitan area, about 10 acres of rural land or open space were converted to urban or suburban development, compared to 49 acres for every new 100 residents in Charlotte, N.C.).

¹⁹ OR. PROGRESS BD., 2005 BENCHMARK PERFORMANCE REPORT 17 (2005), available at http://egov.oregon.gov/DAS/OPB/2005report/obm09.shtml#9__How_Oregon_Compare.

²⁰ ALLAN ET AL., *supra* note 11, at 65.

III. WHAT THE MEASURE MEANS

Set against this backdrop, Measure 37 represents a significant change for Oregon's communities and landscape. Among other aspects, the measure creates a privileged class of landowners, one that enjoys its new rights at their neighbors' expense.²¹

As many have noted, Measure 37 is the first successful attack on Oregon's land-use planning program.²² Although Measure 37 does not directly repeal comprehensive planning or zoning, it creates a new system whereby state and local governments must pay if land-use regulations reduce the value of property, or else waive the regulations.²³ Because the measure provides no resources for payment, state and local governments are left with but a single option to waive the very zoning ordinances that protect neighboring land uses from incompatible development.²⁴

A. Meaning of the Measure: Provisions, Exceptions, and Ambiguities

1. Determining Restriction on Use

Under Measure 37, a landowner is entitled to payment if a government enacts or enforces a "land use regulation"²⁵ that restricts the use of property

²¹ Indeed, in so doing, the Measure violates the Privileges and Immunities clause (article I, section 20) of the Oregon Constitution. *See MacPherson v. Dep't of Admin. Servs.*, No. 05C10444, slip op. at 13–15 (Marion County, Or. Cir. Ct. Oct. 14, 2005).

²² Four previous initiatives in 1976, 1978, 1982, and 2000 have challenged SB 100 and Oregon's statewide land-use planning program. Of these, only the 2000 initiative Measure 7 passed, but it was invalidated and declared unconstitutional and never went into effect. *See League of Or. Cities v. State*, 56 P.3d 892, 911 (Or. 2002). The fact that both Measure 37 and its predecessor Measure 7 address payment to property owners for government actions and do not repeal or amend land-use planning directly is immaterial at this point when the effect of Measure 37 is to eviscerate community planning in Oregon.

²³ Section (1) of Measure 37 provides:

If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

Section (8) of Measure 37 authorizes the governmental entity, in lieu of compensation, to modify, remove, or not apply the land-use regulations to allow the owner to use the property for a use permitted when the owner acquired the property.

²⁴ Nor does the Measure provide any resources for processing Measure 37 claims. In January 2005, the Emergency Board allocated \$325,000 to the Department of Land Conservation and Development (DLCD), and another \$259,000 to the Department of Administrative Services (DAS) for processing costs alone. In the 2005–2007 biennial budget, the state allocated another \$1.5 million to DLCD alone. This budget does not include the costs to the city and county governments, many of whom are swamped with claims. *See, e.g., Les Gehrett, Measure 37 Claims Swamp Linn County Staff*, ALBANY DEMOCRAT-HERALD, Feb. 28, 2005, available at <http://www.dhonline.com/articles/2005/02/28/news/local/news02.txt>.

²⁵ The definition of "land use regulation" in Measure 37 differs substantially from that already in statute (OR. REV. STAT. § 197.015(11)), and includes any statute regulating the use of land, transportation ordinances, and rules regulating farm and forest practices, as well as

and results in a reduction in fair market value of the property.²⁶ Thus, as a first step, the claimant must demonstrate that a regulation enacted after the claimant or a “family member”²⁷ of the claimant acquired the property prevents a use that was permitted at the time the claimant or family member acquired the property.²⁸ Because the definition of family member includes several generations and corporations, there are hundreds if not thousands of claims in rural areas where the claimant can demonstrate that their grandfather or other family member acquired the land before comprehensive planning and zoning.²⁹ Claims based on subdividing farm and forest land spread from Wallowa Lake, to the dairies of Tillamook County, to the ranches of Klamath County, to the orchards of the Hood River Valley.³⁰ The only place protected from the onslaught of Measure 37 is the Columbia River Gorge National Scenic Area.³¹

2. Calculating Reduction in Fair Market Value

In order to have a valid Measure 37 claim, a claimant must also demonstrate that the regulation has had the “effect of reducing the fair market value of the property” before payment is due.³² The measure’s

traditional zoning ordinances and regulations. See Ballot Measure 37 § (11)(B) (Or. 2004).

²⁶ *Id.* § (1). While the measure is silent on the burden of proof, it seems only logical that the claimant bears the burden of satisfying at least the two threshold issues: 1) a land-use regulation has restricted the use of the property as compared to when the property was acquired by the claimant or claimant’s family, and 2) the land-use regulation had the effect of reducing the fair market value of the property in question.

²⁷ Measure 37 defines a “family member” to include “the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, and estate of any of the foregoing family members, or a legal entity owned by anyone or combination of these family members or the owner of the property.” *Id.* § (11)(A).

²⁸ *Id.* §§ (1), (3)(E).

²⁹ Cities received zoning authority in 1919, counties in 1947. In 1963, the Oregon Legislature authorized counties to plan and zone for exclusive farm use, tying that grant of authority to special farm tax assessment for farmers who used their land exclusively for farm purposes. 1963 Or. Laws 577. Several counties, such as Washington, Hood River, and Jefferson, created exclusive farm use zones in the 1960s.

³⁰ Claims across the state range from garbage dumps to gravel mining, commercial development, and residential subdivisions. See, e.g., Laura Oppenheimer, *Land-Use Ruling Sets Stage for Rural Mall*, OREGONIAN, Apr. 15, 2005, at A01 (“Polk County commissioners OK a Measure 37 claim that would allow up to 1 million square feet of commercial space near Dallas.”); Laura Oppenheimer, *Landfill Files Measure 37 Claim*, OREGONIAN, Mar. 29, 2005, at B02 (“Lakeside Reclamation’s operator alleges a 209-foot height limit on one of its piles of garbage could cost the owner \$11.4 million.”); Jerry Raehal, *Claim Raises Questions About Measure 37*, MOLALLA PIONEER, July 25, 2005, available at <http://www.friends.org/issues/documents/M37/m37ns283.pdf> (reporting a claim for gravel mining); Laura Oppenheimer, *Yamhill County Gingerly Treads New Ground*, OREGONIAN, Feb. 1, 2005, at A1, A9 (reporting a claim for residential subdivision on 342 acres of prime farmland adjacent to McMinnville’s urban growth boundary).

³¹ *Columbia River Gorge Comm. v. Hood River County*, Case No. 05-001CC (Hood River County, Or. Cir. Ct. Aug. 1, 2005) (the case has been appealed to the Oregon Court of Appeals, Case No. A129652).

³² Ballot Measure 37 § (1) (Or. 2004).

mechanism for calculating payment is to determine the “*reduction in fair market value* of the affected property interest *resulting from* enactment or enforcement of the land-use regulation as of the date the owner makes written demand for compensation” under Measure 37.³³

Practically speaking, claimants and governmental entities alike have all but ignored this requirement. The Oregon Department of Land Conservation and Development has adopted an assumption, not based on any evidence, that a restriction on use “more likely than not” results in a reduction in fair market value, approving hundreds of Measure 37 claims without any evidence of actual loss.³⁴ And, without any funding for payments to claimants, many county governments view the determination of whether there was a reduction in fair market value as moot. “[W]e’re not going to pay compensation no matter what the amount, whether it’s thousands of dollars or a six-pack of Slider[.]” says Yamhill County Counsel Rick Sanai.³⁵ “Since the county can’t pay, calculating accurate diminution in value is a moot exercise.”³⁶ All Yamhill County landowners have to do is file a claim, and a waiver of land-use laws is granted.³⁷

But the reaction of the Department of Land Conservation and Development, Yamhill County, and other local governments is not without some reason. This is because the payment under Measure 37 is not based on actual loss but rather in such a way to afford windfall profits to landowners and force the hands of the state and local governments to roll back land-use planning protections.

As implemented by all governmental entities, the reduction in fair market value under Measure 37 has not been calculated at the time of the action³⁸—as it is in takings jurisprudence.³⁹ Rather, the payment to the property owner is calculated at the time the claimant files a written demand under Measure 37,⁴⁰ resulting in a payment that gives claimants the benefit of monopoly development as well as other public investments since the land-use regulation was adopted.⁴¹ Such a payment does not represent the

³³ *Id.* § (2) (emphasis added).

³⁴ See, e.g., Louise Bernards, Or. Dep’t of Land Conservation & Dev., Final Staff Report and Recommendation, M119803, at 5, available at http://www.oregon.gov/LCD/docs/measure37/finalreports/M119803_Bernards_Final_Report.pdf (stating that without an appraisal or other information it is not possible to substantiate the specific dollar amount, but determining that it is “more likely than not” that there has been a reduction in fair market value).

³⁵ Jonathan Walters, *Law of the Land: Voters’ Challenge to Oregon’s Stringent Land Use Controls May Signal a Major Shift in the Property Rights Debate Nationwide*, GOVERNING MAGAZINE, May 2005, available at <http://66.23.131.98/archive/2005/may/property.txt>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ In the case of Measure 37, the “action” is the enactment of the land-use regulation.

³⁹ The fair market value of the property is to be measured “as of the date the condemnation is commenced or the date the condemner enters on and appropriates the property, whichever first occurs.” State by and Through Dept. of Transp. v. Lundberg, 825 P.2d 641, 644 n.6 (Or. 1992).

⁴⁰ See Ballot Measure 37 § (2) (Or. 2004) (directing the calculation of a payment to be “as of the date the owner makes written demand for compensation under this act”).

⁴¹ This measure of payment was found to have no rational relation to the aim of compensating landowners for the reduced fair market value of their property interest caused by

amount a claimant has actually lost as the result of the enactment of a land-use regulation, but rather the value of an exemption from land-use regulations that apply, or are presumed to apply, to surrounding properties. Indeed, this was precisely the finding of the Marion County Circuit Court in *MacPherson v. Department of Administrative Services*, finding that the measure was unconstitutional:

[P]ermitting pre-owners to recover based on what their properties are worth today, instead of at the time the land use regulations were enacted and the injury to the owners was thus incurred, has no rational relation to the aim of Measure 37 compensating property owners for the reduced fair market value of their property interest.⁴²

Further, the property rights movement's assertions to the contrary, it simply is not true that land-use regulations *ipso facto* reduce property values.

In a recent analysis, Professor William Jaeger cautions against such a presumption, finding that in many cases the primary effect of a land-use regulation is to increase the value of the lands that are not subject to the regulation, while leaving the fair market value of the now regulated lands untouched or only marginally affected.⁴³ Therefore, "[t]o evaluate the reduction in land value caused by the land use regulation, we need to separate the effect on prices of the regulated lands from the effect on prices for unregulated lands."⁴⁴

Indeed, land-use planning and zoning regulations came into being to protect residents from noise, noxious discharges, and other incompatible uses. Property values increase under regulations that protect and enhance the built and natural environment because they prevent conflicting uses, provide cost-effective public services, and create amenities such as parks. Viewed this way, "[l]and use controls are, in fact, a capitalist plot to *optimize* property values of the majority of owners."⁴⁵ Further, from the perspective of economic growth, maintaining and improving an area's quality of life is

a land-use regulation, and thus was one reason for the court's conclusion that Measure 37 violates the privileges and immunities clause of the Oregon Constitution. In reaching this conclusion, the Marion County Circuit Court noted that property values in the state have increased greatly since the passage of SB 100 in 1974, that much land has been placed off limits to non-resource development, and that the population and demand for property has increased during that time. *MacPherson v. Dep't of Admin. Servs.*, No. 05C10444, slip op. at 14 (Marion County, Or. Cir. Ct. Oct. 14, 2005).

⁴² *Id.* (the court uses the term "pre-owner" to describe those landowners who purchased their property prior to zoning, and the term "post-owner" to those who acquired their property after the enactment of a zoning scheme).

⁴³ William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 126 (2006).

⁴⁴ William K. Jaeger, *The Effects of Land Use Regulations on Land Prices* 6 (July 12, 2005) (draft manuscript on file with author).

⁴⁵ Donovan Rypkema, Principal, Place Economics, Property Rights and Public Values, Remarks at the Smart Growth Speaker Series 14 (June 13, 2001), *available at* <http://www.smartgrowth.org/audio/default.asp> ("Most of the value of an individual parcel of real estate comes from beyond the property lines from the investments of others . . .").

essential to economic prosperity.⁴⁶ “It is not an extra. It really is fundamental to the health of our economy.”⁴⁷

Such increases in value aren’t only the province of urban areas. Rather, farm use zoning can also increase agricultural property values. A study of the effect of exclusive farm use zoning in Wisconsin found that farmers were willing to pay more for parcels zoned for exclusive farm use because the future for farming was more certain, with the highest prices for the largest parcels further from development.⁴⁸ Data from the U.S. Census of Agriculture bears this out. Collected in five-year increments, the Census of Agriculture shows a steady increase in the average value of farm land and buildings during the time the statewide land-use planning program was being implemented.⁴⁹

What these studies reflect is that the oft-repeated argument that the effects of regulation are borne by individual landowners for the benefit of the public is erroneous, at least in part by failing to acknowledge that property owners also individually benefit from many land-use protections. Put differently, comprehensive zoning and land-use regulations limit, but protect us all. As the United States Supreme Court has noted, “[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.”⁵⁰ Landowners in single-family neighborhoods benefit from limitations on fast food restaurants and convenience stores and from proximity to parks and other community services, industrial factories benefit from limitations on residential development, and farmers benefit by avoiding the conflicts and negative externalities associated with subdivisions and non-agricultural development.⁵¹

⁴⁶ IMPRESA, INC., WESTSIDE ECONOMIC STUDY: FINAL REPORT 12–13 (2002) *available at* <http://www.westside-alliance.org/westside-story-short/Final%20Report.pdf>; *see also* Ryan Frank, *Westside Forum on the Economy Gives Equal Time to Quality of Life*, OREGONIAN, Nov. 8, 2003, at D1.

⁴⁷ Frank, *supra* note 46 (quoting Joseph Cortright).

⁴⁸ David M. Henneberry & Richard L. Barrows, *Capitalization of Exclusive Agricultural Zoning into Farmland Prices*, 66 LAND ECON. 249, 249–58 (1990) (noting that the likely causes were avoiding externalities associated with non-agricultural development and activities, certainty concerning future land-use compatibilities, and lowering of property tax increases).

⁴⁹ These figures have been adjusted for inflation based on the consumer price index, and are true for every county in Oregon. *See* U.S. DEP’T OF COMMERCE, 1982 CENSUS OF AGRICULTURE: VOLUME 1, PART 37 OREGON STATE AND COUNTY DATA (1984); U.S. DEP’T OF COMMERCE 1978 CENSUS OF AGRICULTURE: VOLUME 1, PART 37 OREGON STATE AND COUNTY DATA (1981); U.S. DEP’T OF COMMERCE, 1974 CENSUS OF AGRICULTURE: VOLUME 1, PART 37 OREGON STATE AND COUNTY DATA (1977).

⁵⁰ *Keystone Bituminous Coal Ass’n v. De Benedicts*, 480 U.S. 470, 491 (1987). While *Lingle v. Chevron U.S.A., Inc.*, 2005 U.S. Lexis 4342, at *10–15 (2005) declared that the question of whether the application of a general zoning law “substantially advances” a legitimate state interest is not a valid method of identifying compensable regulatory takings, the observation of the positive effect of land-use regulations is undisturbed.

⁵¹ *See, e.g.*, NAT’L PARK SERV., ECONOMIC IMPACTS OF PROTECTING RIVERS, TRAILS, AND GREENWAY CORRIDORS (4th ed. 1995), *available at* http://www.nps.gov/pwro/rtca/econ_all.pdf (finding that rivers, trails, and greenway corridors have the potential to create jobs, enhance property values, expand local businesses, and promote a local community, among other benefits); AMERICAN PLANNING ASS’N, HOW CITIES USE PARKS FOR ECONOMIC DEVELOPMENT

It might be the reason that your hundred-acre farm on a pristine hillside is worth millions to a developer is that it's on a pristine hillside: if everyone on that hillside could subdivide, and sell out to Target and Wal-Mart, then nobody's plot would be worth millions anymore.⁵²

In fact, some would argue, "compensation measures that endanger such regulations could actually threaten the property rights of most landowners."⁵³ If land-use regulations are weakened in lieu of payments, those same claimants could be subject to negative uses from which they were once protected.

This theory became reality in Deschutes County in March 2005, where a family had filed a Measure 37 demand for \$37 million or the right to develop a 227-house subdivision on more than 1,000 acres of farmland.⁵⁴ Shortly thereafter a utility company filed its own Measure 37 claim seeking permission to improve a five-mile portion of their power line that runs through an easement on the claimants' property.⁵⁵ Ironically, the utility company's claim arose out of a land-use appeal by the claimants, who, noting that the new poles and power line would adversely affect their views, argued that the proposal did not satisfy applicable land-use regulations.⁵⁶

This describes what Justice Holmes rightly called the "reciprocity of advantage," referring to the benefits that landowners receive from regulatory programs, both as regulated owners and as members of society as a whole.⁵⁷

How then to isolate the effects of the land-use regulation on a property's fair market value? The most direct way is to compare the fair market value of the property *before* enactment of the regulation to the fair

(2002), *available at* http://www.cfr.washington.edu/research.envmind/Policy/APA_econ.pdf (stating parks enhance property values); Broderick Perkins, *High Density Solution for Tight Markets*, REALTY TIMES, May 9, 2002 (planning and new urbanism helps manage growth by limiting strain on land supply, infrastructure, and community services, while supporting economic development), *available at* http://realtytimes.com/printtrpages/20020509_high_density.htm; HENNEBERRY, *supra* note 48 (farmers' willingness to pay more for farm-zoned land is likely the result of avoiding externalities associated with non-agricultural development and activities, certainty concerning future land-use compatibilities, and lowering of property tax increases); WILSON E. SCHMISSEUR ET AL., FARM AND FOREST LAND RESEARCH PROJECT: SURVEY OF FARM AND FOREST OPERATORS ON CONFLICTS AND COMPLAINTS, TASK iii, 8 (1991) (added operating costs and lost revenue opportunities associated with conflicts varied from a high of \$11.75 per acre in the Willamette Valley to \$0.75 per acre in southern Oregon); Rypkema, *supra* note 45 ("Most of the value of an individual parcel of real estate comes from beyond the property lines from the investments of others . . .").

⁵² Malcolm Gladwell, *The Vanishing*, NEW YORKER, Jan. 3, 2005, at 72 (reviewing JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2005)), *available at* http://www.newyorker.com/printables/critics/050103crbo_books (asking if the voters of Oregon will then pass Measure 38, allowing them to sue the state for compensation over damage to property values caused by Measure 37).

⁵³ ELLIE FIORE, OREGON'S LAND USE PLANNING PROGRAM, PROPERTY RIGHTS: CONTESTED COMPENSATION 6 (2004), *available at* <http://www.oregonapa.org/uploads/images/19/Compensation.pdf>.

⁵⁴ Matthew Preusch, *Central Oregon Utility Cites Measure 37 in Power Line Case*, OREGONIAN, Mar. 24, 2005, at B8.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

market value *after* enactment.⁵⁸ Such a “before and after”⁵⁹ analysis captures the “effect of the land-use regulation.”⁶⁰ It also identifies the amount of the loss *at the time* of the “regulatory taking,” which is consistent with takings jurisprudence⁶¹ and avoids the monopoly effect of a Measure 37 claimant who benefits from land-use restrictions on surrounding properties.⁶²

3. Waiver

Measure 37 provides no funding mechanism for paying or processing claims. Consequently, for cash-strapped cities, counties, and the state, the Measure 37 promise that “government must pay” is nothing more than a wolf

⁵⁸ Enforcement of a land-use regulation is also a basis for payment under Measure 37. But, in most cases enforcement will not result in any reduction in fair market value. Consider an example where a property owner owns 80 acres of land zoned for forest uses acquired in 1950, and that current regulations enacted in regulation *X*, 1975, prohibits residential subdivisions on forest lands. The enforcement of regulation *X* today will have no effect on the fair market value of the property because enforcement does not create a change in the circumstances of what can be done with the property that would influence the fair market value of the property. That is, *before* regulation *X* was enforced against the property (such as where a particular land use has been denied) subdivisions were not allowed, and *after* the regulation was enforced subdivisions were not allowed. Therefore, if the regulation is clear as to the likely result of a particular land-use proposal, the mere enforcement of that standard to a particular property will not have any influence on its fair market value. There are some limited exceptions to this general rule, such as certain environmental protections where it is unclear whether the proposed land use will be permitted. In such a case, *before* enforcement of the regulation the fair market value of the property may have included some presumed value based on the seller's and buyer's assumptions as to the likelihood of that use being permitted. If, *after* the land-use application is made, and the local government applies and enforces the land-use regulation not to allow the use, the fair market value of the property may be influenced by the knowledge that there is no fair assumption the property is likely to be permitted for that particular use.

⁵⁹ This could be more completely described as an analysis of the property before (without the land-use regulation), and after (with the land-use regulation).

⁶⁰ Assuming of course that there were no other factors within the market place that simultaneously affected property values, such as interest rates, (high interest rates generally decrease property values, particularly farmland values since farmers typically borrow operating funds leveraging their property; the current low mortgage rates are often cited as a reason for rising house prices).

⁶¹ Takings jurisprudence calculates the “fair market value” of the property at the time of the taking. *See* Dep't of Trans. v. Lundberg, 825 P.2d 641, 644 n.6 (Or. 1992) (“Valuation of property is measured as of the date the condemnation action is commenced or the date the condemnor enters on and appropriates the property, *whichever first occurs*.”) (emphasis added, internal citations omitted); Dep't. of Trans. v. El Dorado Properties, 971 P.2d 481, 484, 486 (Or. Ct. App. 1998) (property is valued as of the date of taking, noting also that if possible future use is at issue, essential requirement is that the prospect of the use is more than a speculative forecast, and that the probability of the use is such that a future buyer would attach a value to the property) (internal citations omitted); *see also* Dep't of Trans. v. Hewett Professional Group, 895 P.2d 755, 763 (Or. 1995) (in an inverse condemnation case the “taking” in that case relates back to the date of the beginning of the governmental conduct that is determined to be a ‘taking.’”) (internal citations omitted).

⁶² ANDREW J. PLANTINGA, MEASURING COMPENSATION UNDER MEASURE 37: AN ECONOMIST'S PERSPECTIVE 6–11 (2004), *available at* <http://arec.oregonstate.edu/faculty2/measure37.pdf> (assuming that regulations still apply to surrounding properties allows the claimant to receive the benefit of higher compensation; also noting that such a calculation is incompatible with the definition of fair market value).

in sheep's clothing. "In view of the scarcity of tax dollars for needed roads, parks, police, firefighters and libraries, laws such as Measure 37 present communities with a Hobson's choice."⁶³ Without any money to pay claims, the state and local government is left with effectively one option—to waive the land-use regulations for Measure 37 claimants, regulations that continue to apply to neighboring landowners.

Measure 37 provides that in lieu of payment: "the governing body responsible for enacting the land use regulation may modify, remove, or not to [sic] apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property."⁶⁴ As of November 2005, no local government or the state has provided payment to a Measure 37 claimant. While some counties and cities did provide an option for concerned neighbors and the citizens to raise funds for such payments, the default assumption is that the complained-of land-use regulations will be waived. Indeed, the rules adopted by the Oregon Department of Land Conservation and Development require the Director to waive land-use regulations for valid Measure 37 claims, unless funding becomes available.⁶⁵ Thus, at present, no matter how small the loss, community and farmland protections are waived.

4. Exemptions

The long list of Measure 37 exemptions appears to be more politically based than policy oriented, seemingly included to quiet those who would cite a parade of horrors as opposition to the measure. Many of the exemptions have no genuine applicability; still others are restatements of law.

Regulations that restrict or prohibit common law public nuisances are exempt under Measure 37.⁶⁶ The exception requires a narrow construction and interpretation, never mind that common law nuisances are difficult to prove.⁶⁷

Regulations restricting or prohibiting certain activities for public health and safety are also exempt under Measure 37.⁶⁸ The measure provides a short non-exclusive list of what regulations fall under this exemption: fire and building codes and health sanitation, solid or hazardous waste, and pollution control regulations. How expansive the exemption is has been a topic of some discussion, but given the attorney fee requirement, most local governments have taken little satisfaction from, or cover under, this exemption. It appears that only the obvious exemptions, such as fire safety standards and floodplain regulations, are being applied.⁶⁹

⁶³ Joseph Tovar, *Oregon's Land Use Nightmare*, SEATTLE TIMES, May 29, 2005, at D5.

⁶⁴ Ballot Measure 37 § (8) (Or. 2004).

⁶⁵ OR. ADMIN. R. 660-002-0010(8)(c) ("[T]he Director may approve a claim only by not applying the statute(s), rule(s) or goal(s) that are the basis of the claim unless legislation is enacted that appropriates funds for the payment of [Measure 37] claims.").

⁶⁶ Ballot Measure 37 § (3)(A).

⁶⁷ Which difficulty was the impetus of modern-day zoning.

⁶⁸ Ballot Measure 37 § (3)(B).

⁶⁹ For example, the Department of Land Conservation and Development has not waived

Land-use regulations required to comply with federal law cannot form the basis of a Measure 37 claim.⁷⁰ But many federal regulations do not require the adoption of specific provisions, leaving the means of compliance to state and local governments instead. One clear exception is the Columbia River Gorge National Scenic Area.⁷¹

It is unclear why the drafters of the measure included the fourth exemption, other than to head off any arguments that Measure 37 would require payment to sellers of pornography or performers of nude dancing.⁷² Given Oregon's broad constitutional provisions for free speech, this exception has no independent legal meaning.

The fifth exception is the only one of consequence. Regulations enacted prior to the date of acquisition by the owner or a family member of the owner are exempt, and therefore may not provide the basis of a Measure 37 claim for payment.⁷³ However, the measure's definition of a family member is quite broad, including the nuclear family, grandparents, nieces, nephews, aunts, uncles, in-laws, the estates of any of the foregoing, or legal entities owned by one or more family members.⁷⁴ The genealogy of land-use regulations is equally important, necessitating the research of land-use regulations and private covenants and restrictions over three generations (or longer if the family member is a corporation).

5. Ambiguities and Other Difficulties

Measure 37 is replete with ambiguities and other difficulties. Two counties actually sued themselves in an effort to seek clarity.⁷⁵ In most cases, the state and local governments are entering into uncharted territory, and under the gun of a 180-day limitation for addressing the claim as well as the threat of liability for the claimant's attorney fees and costs should the government's decision be in error.⁷⁶

regulations relating to fire breaks around new houses in forest zones. *See, e.g.*, Department of Land Conservation and Development Final Staff Report and Order, Claim Number M120178, at 6–7, *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M120178_Holbert_Final_Report.pdf (stating that the fire safety standards are exempt from Measure 37 and will continue to apply to the claimants' use of the property).

⁷⁰ Ballot Measure 37 § (3)(C).

⁷¹ *See* Columbia River Gorge National Scenic Act, Pub. L. No. 99-663, 100 Stat. 4274 (1986); OR. REV. STAT. §§ 197.005–197.165 (2003); *Columbia River Gorge Comm'n v. Hood River County*, No.05-001CC (Hood River County, Or. Cir. Ct. Aug. 1, 2005) (holding that Measure 37 does not apply to the Oregon counties implementing the Columbia Gorge National Scenic Area Act, the Columbia River Gorge Compact, or the Management Plan adopted by the Columbia River Gorge Commission because those land-use regulations are “required to comply with federal law” as that term is used in exemption 3(E) of Measure 37).

⁷² *See* Ballot Measure 37 § (3)(D) (exempting restrictions on property relating to the sale of pornography or performance of nude dancing).

⁷³ *Id.* § (3)(E).

⁷⁴ *Id.* § (11)(A).

⁷⁵ *Crook County v. All Electors*, No. 05CV0015 (Crook County, Or. Cir. Ct. Feb. 3, 2005); *Jackson County v. All Electors*, No. 052993E3 (Jackson County, Or. Cir. Ct. Aug. 29, 2005).

⁷⁶ With so many unknowns, both the state and local governments approach Measure 37 at least in part as a risk management exercise, operating to avoid the possibility of appeal by a claimant, which, if successful, will result in an award of attorney fees, costs, and expenses from

Not surprisingly, professionals in real estate are reacting cautiously as well. The Oregon Association of Realtors has warned realtors not to provide any advice on Measure 37, and instead direct their clients to attorneys and other professionals in real estate. Bankers have expressed reluctance to loan for development under Measure 37 waivers, out of concern that because waivers are not transferable to new owners, banks will have no or insufficient collateral for the loan.⁷⁷ Most recently, the Professional Liability Fund for the Oregon State Bar admonishing attorneys that “some basic estate planning techniques involving real property may no longer be advisable.”⁷⁸

Perhaps most noticeably absent is any requirement that neighbors or other affected property owners receive notice or an opportunity to be heard about claims that may affect their businesses, communities, and property values.⁷⁹ Fortunately, many local governments, and the state, have provided for an opportunity to comment, either orally or in writing. But the local and state governments are often powerless to address neighbors’ concerns—Measure 37 cares not about the impact to others, many of whom purchased their property on reliance of the zoning scheme.

One area of practical difficulty is how many claims can be or must be brought for a particular parcel of land. Must the property owner file a claim for all applicable land-use regulations at once? Or can the property owner bring multiple, separate claims for different regulations and restrictions?⁸⁰ On the flip side, many of the land-use regulations at which this measure is directed are both state and local requirements. That is, state law directs counties to adopt particular minimum regulations, as well as regulations to achieve certain goals. Because the measure only authorizes the “governing body responsible for enacting the regulation” to waive the complained of regulation, a claimant must file two claims, one with the State of Oregon, and the other with the county government.

One assumes—though the measure is silent—that claimants cannot double-dip and receive payment from both the state and the local government. One also assumes that a property owner cannot return and file

the governmental entity to the claimant. *See* Ballot Measure 37 § (6) (awarding fees, costs, and expenses to the claimant).

⁷⁷ Kenneth Sherman, *Who Moved My Cheese and the Dairy Along With It? The Hidden Perils of Measure 37*, BANKERS’ ADVOCATE, Jan.–Feb. 2005, at 11, 11 (“The benefits of Measure 37 are personal to the family who owned and mortgaged the property, and won’t follow the property when the bank or third party becomes the owner.”).

⁷⁸ Jay Richardson, *Measure 37 and Estate Planning and Administration*, OR. ST. B. PROF. LIABILITY FUND: IN BRIEF, June 2005, at 1, 1 (advising lawyers to exercise great caution in advising clients on transferring real property for estate planning purposes, given the provisions of Measure 37).

⁷⁹ This omission was the basis for the Marion County Circuit Court’s conclusion that Measure 37 violates procedural due process rights under the 14th Amendment of the U.S. Constitution. *MacPherson v. Dep’t of Admin. Servs.*, No. 05C10444, slip op. at 19–21 (Marion County, Or. Cir. Ct. Oct. 14, 2005).

⁸⁰ Of course, doing so would result in further confusion and complications. In most if not all cases it is impossible to isolate the economic impact of a particular regulation on a particular parcel of property, especially when there are other similar regulations that may affect the uses and value of the property—as well as those of surrounding properties.

a subsequent demand based on different land-use regulations, or for that matter make a demand for a different restricted use based on the same regulations. One sure way to avoid this circumstance is to record a deed restriction upon payment that limits the uses of the property to those allowed at the time the payment was made, precluding a subsequent claim.⁸¹

Another area of practical difficulty is the statute of limitations, which is illusory at best. Under section 5 of the measure, a claimant has two years from the date of enactment of the land-use regulation *or* two years from the date the regulation is applied to the property as an approval criterion. Because a property owner can file a land-use application at any time, there is no functional limitation as to when a claim can be brought.

Transferability of land-use waivers is a critical issue under Measure 37. The Oregon Attorney General has rightly opined that Measure 37 waivers are personal rights and therefore do not run with the land.⁸² As a result, it is only the current owner who receives the waiver that has an ability to develop; that right may not be sold or otherwise transferred to a developer to build a subdivision, or for Wal-Mart to build a new superstore.⁸³ Nor is such development likely to be financed by banks. The personal right provided under Measure 37 extinguishes upon death or disposition of the property. Therefore the banks have nothing to secure should a property owner default, sell, or die before the development is complete. However, a property owner likely can develop the property on his or her own,⁸⁴ and have the ability later sell the house as a nonconforming use, well protected under Oregon law.⁸⁵

B. Implications for Land-use Planning in Oregon: Now and Future Chilling Effects

Perhaps the most immediate effect of Measure 37 was to halt future land-use planning efforts. Within days of the November 2004 vote, the League of Oregon Cities recommended that cities consider suspending any

⁸¹ Similarly, in the case of a waiver, the governmental entity could require the recordation of the final decision and order, including a statement that the waiver satisfies any claim under Measure 37 enacted prior to the date of the order. Whether such consolidation is permissible is unclear.

⁸² Letter from Stephanie Striffler, Special Counsel to the Attorney General, Oregon Department of Justice, to Lane Shetterly, Director, Oregon Department of Land Conservation and Development (Feb. 25, 2005), *available at* <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf>. Ballot Measure 37 § (8) authorizes the government entity to waive the applicable land-use regulations “to allow the *owner* to use the property for a use permitted at the time the owner acquired the property.” (emphasis added). Thus, the authorization extends to the owner, not to the land. Notably, the Measure does not authorize the *land* to be used, but rather the *owner* to use the land.

⁸³ See Eric Norberg, Editorial, *Possible Snag for that Proposed Wal-Mart?*, THE BEE, Nov. 4, 2005, *available at* <http://www.friends.org/issues/documents/M37/Sellwood-Bee-M37-Wal-Mart-2005-11.pdf> (describing one developer's proposal to use Measure 37 as a means to site a Wal-Mart in the Sellwood area of Portland).

⁸⁴ The development of a single-family home is also more commensurate with the pretenses under which this measure was sold to the voters: the ability to build a retirement home or house for a family member.

⁸⁵ OR. REV. STAT. § 215.130 (2003).

plans for new land-use regulations or comprehensive plan amendments.⁸⁶ Several local governments are unsure how to proceed—even on rezoning lands for needed industrial development—out of a concern that such an action will only give rise to Measure 37 claims, and thus undermine their planning.

There is every reason to believe that cities and counties will be reluctant to engage in new planning efforts. Unless the local government is willing to pay landowners, successful Measure 37 claims will result in waiving the new regulations, putting the government back at square one—as if they did nothing.⁸⁷ Even the administrative costs of reviewing Measure 37 claims are prohibitive for many jurisdictions, making land-use planning a Pandora’s box that planning officials will be loathe to open. As Justice Holmes cautioned, “Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁸⁸ Such is the experience in Florida, even with its much less draconian regulatory takings measure.⁸⁹

What this means is that local governments will be ill equipped to address the future for their communities. For Oregon to grow and prosper in the next thirty years, while maintaining our quality of life and welcoming another 1.7 million people, will require effective land-use planning. Without it, Oregon will suffer the growing pains of many other states.

To date, over 2,500 claims have been filed with the state and local governments.⁹⁰ Most of the claims appear to be for subdivisions on farm and forest lands, affecting over 66,000 acres across Oregon.⁹¹ Clackamas and Washington counties—ranking second and third in gross farm sales respectively—are two of the hardest hit.⁹² By July 2004, only eight months into Measure 37, claims had been filed on over 9,000 acres of farm and forest land in Washington County, with another 7,000 in Clackamas County.⁹³ In Yamhill County, home to the famous Red Hills of Dundee, Measure 37 claims have been filed on nearly 8,000 acres, and the county has issued eligibility letters on another 7,000 acres.⁹⁴

⁸⁶ League of Oregon Cities, *Measure 37 Advisor*, INFORMATION AND GUIDANCE FOR CITIES, Nov. 12, 2004, at 1, 1–4, available at <http://www.orcities.org/Portals/17/CurrentIssues/M37/m37Advisory1.pdf>.

⁸⁷ Requiring government to pay no matter how small the diminution in value is extremely onerous and likely to halt many government actions.

⁸⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁸⁹ HARVEY M. JACOBS, *STATES PROPERTY RIGHTS LAWS: THE IMPACTS OF THOSE LAWS ON MY LAND* 23 (1999) (noting that Florida’s regulatory takings laws have had a chilling effect on the implementation of land-use plans).

⁹⁰ Oppenheimer, *supra* note 3, at A9.

⁹¹ Memorandum from Ron Eber, Farm and Forests Lands Specialist, Department of Land Conservation and Development, to Lane Shetterly, Director, Department of Land Conservation and Development Jan. 5, 2006) (on file with author) (outlining the department’s preliminary draft analysis of Measure 37 claims based on unverified data submitted by claimants).

⁹² Oregon Dep’t of Agric., *Oregon Agriculture: Facts and Figures* (2005), <http://oregon.gov/ODA/docs/pdf/pubs/ff.pdf> (last visited Jan. 22, 2006).

⁹³ Draft Map, Metro Data Resource Center, Measure 37 Claims Filed (July 28, 2005) (on file with author) (received from Lydia McNeil, Metro).

⁹⁴ Map, YAMHILL COUNTY PLANNING DEPARTMENT, YAMHILL COUNTY MEASURE 37 ACTIVITY

Measure 37's reach extends far beyond the Willamette Valley. Almost 200 claims have been filed in Jackson County;⁹⁵ per capita, Baker County has probably seen more claims than any other county.⁹⁶ Jefferson County has several Measure 37 claims for residential subdivisions in the heart of the North Unit Irrigation District, the county's most productive farmland.⁹⁷

While Measure 37 applies to all property, regardless of zoning, the measure strikes at the heart of Oregon's land-use policies for farms and forests.⁹⁸ Protecting resource lands in large contiguous blocks increases efficiency of operations and maintains a critical mass of land for production while avoiding costly operational conflicts with surrounding owners.⁹⁹ But Measure 37 reintroduces spot-zoning, where the zoning of surrounding property is determined not by a comprehensive community planning scheme, but rather dictated by the length of time the owner has owned the land.

A Measure 37 claim in the St. Johns neighborhood in Portland threatens the neighborhood plan developed during a three-year community planning effort. That claim demands over a half million in compensation, or the right to develop sixty or seventy condos with heights up to seventy-five feet in a (single) family neighborhood. Supporters of the planning process see the opportunity for increased economic development as a result of the plan, "making St. Johns a more desirable place to live and improving everyone's property values."¹⁰⁰ Now there is a risk that Measure 37 development could derail the plan: "The wrong project at the wrong place would undermine [the] goal of protecting property values in Cathedral Park."¹⁰¹

Transportation investments, such as for the Newburg-Dundee bypass, stand in jeopardy. Measure 37 claims close to existing and planned highway interchanges are of concern for the Oregon Department of Transportation because of what increased development will mean for the functioning of the interchanges.¹⁰² Similarly, counties are wondering how to meet their road

(Oct. 6, 2005) (on file with author).

⁹⁵ See Measure 37 Cases Submitted to Jackson County as of 10/25/2005, *available at* http://www.co.jackson.or.us/files/m37_report.pdf.

⁹⁶ Thirty-eight Measure 37 claims have been filed with the Oregon Department of Administrative Services. Or. Dep't of Admin. Servs., Measure 37 Web Registry, *available at* <http://www.oregon.gov/DAS/Risk/docs/RegistryReport.pdf>.

⁹⁷ *Id.*

⁹⁸ To put the number of acres into perspective, the number of acres of farm and forest lands now subject to Measure 37 claims exceeds the amount of land that has been brought into urban growth boundaries since 1987. See Dep't of Land Conservation and Dev., 2002 Farm Report, tbl. O (August 24, 2002), *available at* <http://www.oregon.gov/LCD/docs/rural/farm2002.pdf>.

⁹⁹ See generally HENNEBERRY, *supra* note 48; SCHMISSEUR, *supra* note 51; WESTERN PLACER COUNTY, AGRICULTURAL LAND ASSESSMENT AND AGRICULTURAL LAND CONSERVATION CRITERIA 5-1 to 5-3 (Jan. 2002) *available at* <http://www.placer.ca.gov/agriculture/western-placer-ag-study-2002/ch-5-effects-land-conversion.pdf>.

¹⁰⁰ Don Hamilton, *Measure 37 Tensions Loom Large in St. Johns: Property Owner Wants Payback for Dashed Condo Dream*, PORTLAND TRIB., Apr. 22, 2005, at A5 (citing Erik Palmer), *available at* <http://www.portlandtribune.com/archview.cgi?id=29538>.

¹⁰¹ *Id.* (quoting Erik Palmer).

¹⁰² The development models on which such projects were based—comprehensive land-use planning with development concentrated within defined urban growth boundaries, and rural resource uses outside the boundary—are no longer accurate under Measure 37.

needs, with Measure 37 opening the door for subdivisions. In Yamhill County, Measure 37 waivers for three claims total sixty new homes on a country road that winds through farmland. As one county commissioner has noted “with Measure 37, there will be rural subdivisions, and there will be an impact on the infrastructure, and it has to be paid for.”¹⁰³

IV. OREGON’S FUTURE

Some read Measure 37 as representative of a nationwide paradox in public opinion—“Although voters tend to favor protection of farmland and open space, they vote down these protections if they perceive them as restrictions on personal rights.”¹⁰⁴

How could this happen in Oregon where comprehensive planning is such a success story? Does Measure 37 mean that Oregonians no longer want to plan for the future or protect farm or forest lands?

Based on opinion polls conducted before and after the November 2004 vote on Measure 37, the answer is pretty clearly no.

- 53 percent believe that state land-use laws are “about right” or “not strict enough”;¹⁰⁵
- 64 percent believe that protecting farmland is “very important”;¹⁰⁶
- 70 percent support public planning over private market decisions, and protecting land for future needs;¹⁰⁷
- 69 percent believe growth management has made Oregon a more desirable place to live.¹⁰⁸

So what caused this disconnect? How can Oregonians support these values and vote for Measure 37? Oregon voters believed this was about preventing government from taking private property and treating property owners unfairly.¹⁰⁹ Oregon voters also support “property rights” and oppose

¹⁰³ David Bates, *Lewis Looking for New County Road Money*, MCMINNVILLE NEWS REG., July 5, 2005 (quoting Commissioner Mary Stern), available at http://www.newsregister.com/news/story.cfm?story_no=195682.

¹⁰⁴ Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1.

¹⁰⁵ CFM RESEARCH, OREGON LAND USE STATEWIDE SURVEY 3 (2005), available at <http://www.oba-online.org/cms/images/landuseanalysisissurvey.pdf>.

¹⁰⁶ *Id.* at 9.

¹⁰⁷ *Id.* at 18, 20.

¹⁰⁸ *Id.* at 21.

¹⁰⁹ Several voter pamphlet statements in support of Measure 37 cast the measure as addressing the government “taking” private property. See, e.g., Larry George, *Oregon Family Farmers Ask For A Yes Vote on Measure 37*, in 1 VOTERS’ PAMPHLET 106, 106 (Office of Or. Sec’y of State ed., 2004), available at <http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf> (“If state or local governments want to take your property, then they should be required to pay for it.”); Keith Nelsen, *Oregon Farmers Ask That You Vote Yes On Measure 37*, in 1 VOTERS’ PAMPHLET 105, 105 (Office of the Or. Sec’y of State ed., 2004), available at

unfair government action. In the March 2005 survey sponsored by the Oregon Business Association and Portland State University, sixty-seven percent identified property rights as a very important issue.¹¹⁰ Yet, voters refused to believe this measure would roll back land-use planning protections, or allow large tracts of farmland to be subdivided for residential and commercial development. They saw Measure 37 as righting a wrong if government treated a property owner unfairly. Oregonians are asking for the protection of property rights, while safeguarding farmland and planning for the future. It is not an either-or, but rather how to achieve both.

Today, unfortunately, property owners across Oregon who supported Measure 37 are beginning to see the true intent of Measure 37 to roll back community and farmland protections, and are realizing they got hornswaggled on fairness. Now neighbors near Measure 37 claims express concern and dismay over what Measure 37 may mean for their communities. Tom McCready, a Christmas tree farmer who voted for Measure 37, says he “saw the ads with that old lady and her farm and really didn’t know a lot of the other things it would do.”¹¹¹ He voted for Measure 37 and now says “I feel like a stupid fool.”¹¹² He is in good company with many others who say what Measure 37 is not what they thought they were voting for.¹¹³

The constitutional challenge and Marion County Circuit Court ruling that Measure 37 is unconstitutional will not provide the final answer. Instead, it provides a reprieve from development and subdivisions under Measure 37 waivers—a first step on the road to rebuilding a public consensus on equity and fairness in land-use planning. Nor will a successful ruling by the Oregon Supreme Court be the end of the line. Oregonians in Action has already filed eleven initiatives for the 2006 election cycle and will likely file additional initiatives as well, banking on the anger of the private property rights movement at yet another constitutionally-flawed initiative.¹¹⁴

Oregonians have two opportunities to address fairness in land-use planning and come together to plan for the future of their communities and the state: 1) create a program of transferable development credits, and 2) participate in the “Big Look,” a state-sponsored review of Oregon’s land-use planning program.

<http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf> (“No one should be able to use a legal loophole to take away your property without compensation.”). In the CFM research survey, 36% of those who said they favored the Measure 37 wording said it was because property owners should be compensated for land taken away. CFM RESEARCH, *supra* note 105, at 12.

¹¹⁰ CFM RESEARCH, *supra* note 105, at 9.

¹¹¹ Jerry F. Boone, *Measure 37 Claims, Fears are in the Details*, OREGONIAN, Sept. 21, 2005, at C1.

¹¹² *Id.*

¹¹³ *Id.* While not all property owners are surprised by the details of Measure 37, many express regret when they experience firsthand the effect of Measure 37 on their farms and neighborhoods, expressing surprise that they are not entitled to notice or hearing, and that their potential loss in value is not a factor in deciding whether to grant a waiver of land-use regulations.

¹¹⁴ Most of Oregonian in Action’s (OIA’s) initiatives amend Measure 37 and therefore are ineffective if the Oregon Supreme Court upholds the circuit court determination that Measure 37 is unconstitutional.

*A. Addressing Fairness and “Regulatory Takings”: Transferable Development Credits*¹¹⁵

Adopting a program of transferable development credits (TDCs) provides an opportunity to both pay landowners for forgone development and recapture windfalls resulting from government actions such as expansion of urban growth boundaries and other upzoning.¹¹⁶ Designed to direct development from lands in need of protection (sending areas) to lands available for new or increased development (receiving areas), transferable development credits would work well in Oregon to pay claimants, as well as to address the inequities in land-use actions.¹¹⁷ To date, transferable development credits are used in more than 134 communities in 32 states, including Oregon.¹¹⁸ TDCs can be used to address a broad range of planning issues including farmland protection, historic preservation, remediation of groundwater contamination, provision of open space, and equity and fairness concerns about regulatory burdens.

1. How do TDC programs work?

TDC programs identify areas such as farmland as a sending area, and allocate an appropriate number of TDCs to each property. Receiving areas for the development are also designated, typically within existing urban growth boundaries. Within a sending area, a landowner sells development credits, in exchange for voluntarily placing a deed restriction or easement limiting future development of their property.¹¹⁹ In the receiving area, a buyer purchases TDCs to develop land, to increase height limitations, or to increase or decrease housing densities. Both the buyer and seller’s actions are voluntary.

In La Pine, Oregon, a transferable development credit program redirects development from rural lots to a new neighborhood in the community of La

¹¹⁵ The term “transferable development credits” is used for this essay. Such programs are also known as “transferable development rights.”

¹¹⁶ Similar concepts were discussed during the 2003 and 2005 legislative sessions, and included in SB 308 and 406 in 2005. S.B. 308, 73d Leg., Reg. Sess. (Or. 2005), *available at* <http://www.leg.state.or.us/05reg/measures/sb0300.dir/sb0308.intro.html>; S.B. 406, 73d Leg., Reg. Sess. (Or. 2005), *available at* <http://www.leg.state.or.us/05reg/measures/sb0400.dir/sb0406.intro.html>.

¹¹⁷ *See generally* WINDFALLS FOR WIPEOUTS: LAND CAPTURE AND COMPENSATION (Donald G. Hagman & Dean J. Mischynski eds., 1978).

¹¹⁸ RICK PRUETZ, *BEYOND TAKINGS AND GIVINGS* 7 (2003). Oregon has two programs, one addressing historic preservation in Portland, and the other addressing rural development and groundwater contamination in La Pine, Deschutes County.

¹¹⁹ A TDC deed restriction or easement severs any potential development rights and control the future development and use of the sending site. In particular, a TDC deed restriction or easement should address: 1) the number and type of dwelling units allowed; 2) the allowed uses, such as agriculture or forestry; and 3) the prohibited uses, such as non-agricultural uses or land future land divisions. Typically, the local government and landowner are parties to the deed restriction or easement. In many cases, TDC programs also require the participation of a third party such as a land trust.

Pine.¹²⁰ The primary purpose of the program is to prevent further groundwater contamination by preventing the installation of septic systems in south Deschutes County, but the program also supports other goals, such as reducing wildfire hazards from residential development, protecting wildlife, and creating a new neighborhood that provides services efficiently and sustains economic development. Deschutes County purchases the TDCs from willing rural property owners from designated sending areas; in order to develop in the new La Pine neighborhood, developers must purchase TDCs from the county.¹²¹

2. Application to Measure 37

In the context of Measure 37,¹²² land zoned for exclusive farm use, forest use, and other areas identified for protection outside urban growth boundaries could be classified as sending areas. Landowners within the sending areas would receive TDCs that are transferable to areas newly added to urban growth boundaries,¹²³ designated as receiving areas. Development within the UGB receiving areas would be allowed only with the purchase of transferable development credits. Thus, new development within urban growth boundaries would fund payments to rural property owners. Under such a system, “[p]rivate parties pay other private parties for rights to develop their realm, and [TDCs] are the coin of the realm.”¹²⁴

The development of a TDC bank adds further value to TDC programs, often by jump-starting a private market. By purchasing TDCs at a predetermined price, TDC banks can assure a base price for TDCs, while also providing a starting point for negotiations between private buyers and sellers. TDC banks serve as a facilitator for transactions by allowing the deposit of TDCs for future undetermined development and the later purchase by third parties. From the development perspective, TDC banks also perform the important function of reducing transaction costs for TDC acquisitions and ensuring that needed TDCs are available.¹²⁵

Perhaps the most important function of a TDC bank is to leverage conservation funding, particularly for seed money to start the process of purchasing TDCs. An initial investment of seed money is critical to

¹²⁰ See generally, DESCHUTES COUNTY, TRANSFERABLE DEVELOPMENT CREDIT PROGRAM UPDATE (May 2004), available at <http://www.deschutes.org/download.cfm?DownloadFile=9F2566B6-BDBD-57C1-944E0C31846F29DD> (last visited Jan. 22, 2006).

¹²¹ Due to new scientific information, Deschutes County will be making adjustments to its TDC program. Telephone conversation with Catherine Morrow, Planning Director, Deschutes County (Nov. 2, 2005).

¹²² It should be noted that an effective TDC program in Oregon need not rely on or operate in conjunction with Measure 37, or a similar regulatory takings initiative. Rather a TDC program in Oregon could be adopted independently and provide an overlay of additional protections for key resources. It is only for purposes of this essay that I relate a TDC program to Measure 37.

¹²³ As discussed previously, TDCs are only granted upon a recordation of a deed restriction or easement placed on the land. See *supra* note 119.

¹²⁴ Keith Aoki, *Look Beyond Oregon to Find a Way Out of Measure 37 Maze*, REG. GUARD, July 3, 2005.

¹²⁵ If supply of TDCs becomes too small, a TDC bank can hold onto a portion of the TDCs that have been deposited to ensure supply and therefore reasonable prices.

establishing a revolving fund to buy and sell TDCs. Without an initial supply, developers are reluctant to build TDC-dependent projects, and buyers are reluctant to enter the market.

Adopting a statewide TDC program has several advantages. Under Measure 37 local and state governments are bound by a pay or waive scheme that is untenable both financially and in terms of impact to farm and forest lands and communities. In contrast, a TDC program affords the opportunity to transfer some of the regulatory “givings” from upzoned land during urban growth boundary expansions to owners of farm and forest land. Private parties pay other private parties, with the government or a TDC bank serving as the facilitator, and critical resources such as farm and forest land are protected. A TDC program therefore affords the opportunity to address fairness, while maintaining land-use laws that make communities more livable and protect farm and forest lands.

B. Addressing Community Planning: SB 82 and the Task Force on Land-Use Planning

Known informally as the “Big Look,” Senate Bill 82 establishes a three-year assessment of Oregon’s land-use planning program led by a new Task Force on Oregon Land Use Planning. Among other items, this ten-member task force is required to make an interim report to the 2007 legislature with legislative recommendations on:

- (a) The effectiveness of Oregon’s land use planning program in meeting current and future needs of Oregonians in all parts of the state;
- (b) The respective roles and responsibilities of state and local governments in land use planning; and
- (c) Land use issues specific to areas inside and outside urban growth boundaries and the interface between areas inside and outside urban growth boundaries.¹²⁶

A final report is due to the Legislative Assembly on February 1, 2009.

If done well, the “Big Look” has the opportunity to create a shared vision for an Oregon in 2040 and beyond. It will reach out to Oregonians and ask them to articulate their goals and needs for their communities, and make recommendations for change where necessary. It will look beyond special interests to determine whether Oregon has achieved the goals we

¹²⁶ S.B. 82, 7rd Leg. Reg. Sess. (Or. 2005), available at <http://www.leg.state.or.us/05reg/measures/sb0001.dir/sb0082.en.html>. Unfortunately, only \$600,000 has been budgeted by the state for this effort. The kind of serious outreach and communications Oregon required for this effort to be successful and engage Oregonians will cost far more. Without additional funding, this task force is unlikely to make a difference.

established in 1973, and whether those goals will meet the needs of the state in 2040.

1. First question: Where should the "Big Look" look?

The Big Look should focus on the changes that are coming Oregon's way in the next several decades. One is continued strong population growth: by 2040, Oregon will add nearly 3 million more people, for a total population of 5.5 million (compared to 3.6 million today).¹²⁷ If trends continue, Oregonians will also be much more ethnically diverse. The Big Look should help enhance Oregon's competitiveness in a world with over 8 billion people, very expensive petroleum, and a changing world farming economy. The most pressing need is to prepare for this future in which we and our children will live, which is why the Big Look should focus its gaze on *envisioning our future*.

2. Second question: Who should do the looking?

Most agree that the Task Force members should be broad-gauge thinkers, respected in their communities or statewide, and not beholden to any of the interest groups that have battled over land-use policy in the legislature or at the ballot box.

But the Task Force should only be managing the Big Look, not doing the looking. If this effort is successful, it will be because the Task Force serves as a conduit through which the *people of Oregon* do the looking. As many Oregonians as possible must be directly engaged in figuring out where Oregon should be heading, how best to get there, and what tools we need to plan that journey.

Oregon is long overdue for a statewide conversation about planning our future. The Big Look provides an opportunity to engage, inform, and motivate a new generation of Oregonians to take charge of their future rather than simply letting it happen to them.

The last time Oregon engaged its citizens on land-use planning, the results were remarkable. In 1974, in a state of barely two million people, ten thousand people attended workshops and hearings and *one hundred thousand* Oregonians were on the Land Conservation and Development Commission's mailing list.¹²⁸ In today's Oregon, with nearly twice as many people, and with vastly more sophisticated methods, we should ensure that fifty thousand voices are heard directly by the Task Force in the next three years, and that the process engages at least half a million Oregonians to determine their community's future.

¹²⁷ Or. Office of Econ. Analysis, Dep't of Admin. Servs., *Forecasts of Oregon's County Populations and Components of Change, 2000-2040*, http://www.oregon.gov/DAS/OEA/demographic.shtml#Long_term_County_Forecast (last visited Jan. 22, 2006).

¹²⁸ Carl Abbott, *The Oregon Planning Style*, in *PLANNING THE OREGON WAY* 205, 210-11 (Carl Abbott et al., eds., 1994).

3. The third question: How should we look?

To ensure that five hundred thousand Oregonians know enough about the Big Look to inform themselves and potentially participate, the Task Force must design a two-way communications strategy in which Oregonians have a chance to propose ideas, as well as respond to proposals. It must be more than “open mike” public hearings, where special interests will pack the hearing room and crowd out the new voices that need to be heard.

To attract attention, the Task Force will need to generate accurate information and competent estimates about current conditions and future trends. Given the endless distractions of modern media, the Task Force will need to *campaign* for the public’s attention, *engage* that attention with accessible and compelling information, and then *reward* that attention by incorporating the public’s ideas into its work.

4. Finally, question four: What should the Big Look at?

The Big Look should focus on *all* the effective tools Oregon will need to achieve our new vision. The focus should be expanded to include the three “i”s:

Incentives: In addition to land-use laws, the Task Force should evaluate the potential for incentives such as acquiring voluntary agricultural easements on farmland and development bonuses and regulatory streamlining to attract the type of development a community desires.

Infrastructure: The Task Force should identify what Oregon needs to do to serve the areas where growth and development is desired, and to provide transportation and other services that can be sustained as energy and environmental stresses increase.

Investment: As competition quickens in the global economy, Oregon must make the most of our strengths and invest in them to ensure success. Because Oregon is not a rich or powerful state, we will need to capitalize on our characteristics that make us unique, such as a strategic location on the Pacific Rim, productive soils for agriculture and timber production on which we can build value-added capacities, landscapes that draw tourists from around the state and nation, and investing in our people through education.

If this is the direction of the Big Look—a careful evaluation of past successes and failures, while focusing on the needs of the state in the next 30 years—Oregonians can be confident that we will have the necessary tools to meet the challenges of the next 30 years, as well as a process to define them for the 30 more that will follow.

V. CONCLUSION

Land-use planning in Oregon has suffered a mounting perception that regulations are not fair to individual landowners, ignoring the individual

benefits of land-use planning in enhancing, protecting, and stabilizing property values, as well as the community benefits. It has been thirty years since Oregonians developed a shared vision of what this state should look like. Viewed in this light, Measure 37 presents not only a crisis, but also an opportunity for Oregonians. We stand to lose much of what we have built, but if we are willing to come together and take another bold step, Oregon could be the first state to have both a comprehensive land-use planning program and a mechanism to better address issues of individual fairness.