

**Lessons from Oregon’s Battle  
over Measure 37 and Measure 49:  
Applying the Reserved Powers Doctrine  
to Defend State Land Use Regulations**

I.	Background: Oregon’s Land Use System .....	263
II.	Voters’ Response to Oregon’s System: Measure 37 and Measure 49.....	265
	A. Measure 37 .....	266
	B. Measure 49 .....	269
III.	The Contract Clause and Its Implications.....	273
	A. The Language and Scope of the Contract Clause.....	273
	B. <i>Citizens I and II</i> : Applying the Contract Clause to Measure 37 Waivers.....	275
IV.	The Reserved Powers Doctrine: A Justification for the Impairment of State Contracts.....	277
	A. The Evolution of the Reserved Powers Doctrine .....	279
	B. Applying the Reserved Powers Doctrine to Protect State Land Use Regulations.....	282
V.	Conclusion.....	286

Oregon has consistently been a leader in the nationwide fight against the depletion of natural resources and urban sprawl.<sup>1</sup> Throughout the 1970s, the Oregon legislature, with the help of state

---

\* J.D. 2010, University of Oregon School of Law; 2009–10 Sustainable Land Use Project Bowerman Fellow, University of Oregon School of Law; B.A. 2006, Political Science and Environmental Studies, Guilford College. This Article evolved from a paper prepared for Professor Mary Christina Wood’s Public Trust Doctrine Seminar. The author would like to thank to Professor Wood for her invaluable guidance and assistance throughout the research and writing process.

<sup>1</sup> See ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 222–223 (1999).

agencies, implemented a revolutionary statewide growth management system “on a scale not witnessed in any other American state.”<sup>2</sup> This system aimed to preserve rural forest and agricultural lands by containing development within designated urban growth boundaries and encouraging sustainable land use planning.<sup>3</sup> The Oregon legislature was motivated by its specific goals for the state, including a desire to help “communities achieve sustainable development patterns and manage the effects of climate change.”<sup>4</sup>

However, Oregon’s ground-breaking approach to land use came to a screeching halt when voters passed Ballot Measure 37, an initiative that entitled property owners burdened by state land use regulations to full compensation for diminished property values.<sup>5</sup> In lieu of compensation, Measure 37 permitted government entities to modify, remove, or waive the application of land use regulations.<sup>6</sup> The passage of Measure 37 was the culmination of a decade-long resistance to Oregon’s land use “overregulation,” an effort spearheaded by groups that had relentlessly advocated for private property rights within the state.<sup>7</sup>

Despite the activists’ triumph, Measure 37 was extremely difficult to implement. At the outset, there was continual uncertainty over whether Measure 37 would survive the judicial and legislative process.<sup>8</sup> The constitutionality of the Measure was quickly challenged in court<sup>9</sup> and the Measure faced major threats of reform from the legislature.<sup>10</sup> Moreover, the language of Measure 37 was both ambiguous and brief, leaving many unanswered questions regarding the scope of the rights protected by the Measure and the

---

<sup>2</sup> Michael C. Blumm & Erik Grafe, *Enacting Libertarian Property: Oregon’s Measure 37 and Its Implications*, 85 DENV. U. L. REV. 279, 281 (2007).

<sup>3</sup> *Id.*

<sup>4</sup> OR. REV. STAT. § 197.010(2)(b) (2010).

<sup>5</sup> See Measure 37 (2004) (codified as amended at OR. REV. STAT. § 195.305 (2007)), available at [http://www.oregonvotes.org/pages/history/archive/nov22004/guide/meas/m37\\_text.html](http://www.oregonvotes.org/pages/history/archive/nov22004/guide/meas/m37_text.html); *DLCD Measure 37*, OREGON.GOV (Jan. 28, 2008), [http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml#Information\\_About\\_the\\_Election](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election) (last visited Apr. 26, 2011).

<sup>6</sup> Measure 37, §§ 8, 10 (codified as amended at OR. REV. STAT. § 195.305(8), (10) (2007)).

<sup>7</sup> Blumm & Grafe, *supra* note 2, at 282.

<sup>8</sup> Alex Potapov, *Making Regulatory Takings Reform Work: The Lessons of Oregon’s Measure 37*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,516, 10,526–29 (2009).

<sup>9</sup> *Id.* at 10,526–27 (discussing *MacPherson v. Dep’t of Admin. Servs.*, 340 Or. 117 (2006)).

<sup>10</sup> *Id.* at 10,527–28.

implementation of the compensation requirement.<sup>11</sup> In response, government actors were repeatedly hostile towards the new scheme, making it even more challenging to execute.<sup>12</sup>

After three years of legal and political struggle, Oregonians recognized the massive implications of Ballot Measure 37 and responded by passing Ballot Measure 49.<sup>13</sup> Measure 49 dramatically scaled back and clarified the development rights shaped by Measure 37.<sup>14</sup> Despite this improvement, Measure 49 left many legal issues unresolved.<sup>15</sup> One of the most critical questions remaining was whether Measure 49 invalidated preexisting land use regulation waivers awarded to Measure 37 claimants. According to Judge Owen M. Panner of the United States District Court for the District of Oregon, Measure 49 had no effect on these regulatory waivers because he interpreted them to be binding, constitutionally protected contracts.<sup>16</sup> However, the Ninth Circuit Court of Appeals quickly reversed Judge Panner's decision and concluded that the Measure 37 waivers did not actually produce a contract between the state and landowner claimants.<sup>17</sup>

This Article examines Oregon's lengthy struggle to achieve a balanced land use system and discusses the potential of the reserved powers doctrine as a tool for retroactively limiting the scope of Measure 37 waivers, along with other regulatory waivers that could arise under similar initiatives proposed and adopted across the United States.<sup>18</sup> The reserved powers doctrine—a time-honored exception to

---

<sup>11</sup> *Id.* at 10,529–34.

<sup>12</sup> *Id.* at 10,535.

<sup>13</sup> Rob Manning, *Measure 49 Just Another Bend in a Long Land Use Road*, OR. PUB. BROADCASTING NEWS (Nov. 7, 2007), <http://news.opb.org/article/measure-49-just-another-bend-long-land-use-road> (last visited Apr. 26, 2011).

<sup>14</sup> Compare Measure 49 (2007) (codified as amended at OR. REV. STAT. § 195.305 (2007)), available at [http://www.oregonvotes.org/pages/history/archive/nov62007/guide/m49\\_text.html](http://www.oregonvotes.org/pages/history/archive/nov62007/guide/m49_text.html), with Measure 37 (2004) (codified as amended at OR. REV. STAT. § 195.305 (2007)), available at [http://www.oregonvotes.org/pages/history/archive/nov22004/guide/meas/m37\\_text.html](http://www.oregonvotes.org/pages/history/archive/nov22004/guide/meas/m37_text.html).

<sup>15</sup> David J. Boulanger, *The Battle Over Property Rights in Oregon: Measure 37 and 49 and the Need for Sustainable Land Use Planning*, 45 WILLAMETTE L. REV. 313, 328 (2008).

<sup>16</sup> *Citizens for Constitutional Fairness v. Jackson Cnty.*, 2008 WL 4890585, at \*2–5 (D. Or. Nov. 12, 2008), *rev'd*, 388 F.App'x 710 (2010).

<sup>17</sup> *Citizens for Constitutional Fairness v. Jackson Cnty.*, 388 F.App'x 710 (9th Cir. July 20, 2010).

<sup>18</sup> Property rights activists across the nation are continually trying to force governments to provide compensation for burdensome land use regulations. To date, there are six states

the Contract Clause of the U.S. Constitution—provides courts with authority to interpret contracts entered into by a state as revocable if they interfere with essential attributes of sovereign power, such as the right to enact regulations that safeguard the public's welfare.<sup>19</sup> Although the Ninth Circuit concluded that Measure 37 waivers are not contracts, precluding the need to apply the reserved powers doctrine to protect Oregon's rural landscape, the doctrine could have strengthened the court's conclusion, and would be useful to courts facing similar dilemmas in the future.

Part I provides a brief introduction to Oregon's expansive land use system. Part II then discusses the revolt against Oregon's system that resulted from the state's approach to private land use regulation. One way that voters expressed their frustration towards state land use regulations was by passing Measure 37. However, the public quickly realized the massive ramifications associated with Measure 37 and passed Measure 49. Part III explores both *Citizens for Constitutional Fairness v. Jackson County* decisions, introduces the Contract Clause of the United States Constitution, and describes how the district and appellate courts applied the Contract Clause to formulate their conclusions. *Citizens I* concluded that the land use regulation waivers granted pursuant to Measure 37 were binding, irrevocable contracts that could not be subsequently altered by Measure 49, while *Citizens II* interpreted these waivers to be fully revocable. Finally, Part IV discusses the reserved powers doctrine as alternative grounds for limiting the scope of Measure 37 and similar state initiatives across the country. The reserved powers doctrine, a common law tool crafted

---

that have adopted "takings compensation laws," including Florida (1995), Louisiana (1995), Mississippi (1995), Texas (1995), Oregon (2004), and Arizona (2006). John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENVTL. L.J. 439, 442-44, 516, 518 (2009). There are also plenty of initiatives that have been unsuccessful. In 2006 alone, property rights activists unsuccessfully attempted to place similar initiatives on ballots in six states, including Montana, Missouri, California, Washington, Idaho, and Oklahoma. *Americans for Limited Government*, BALLOTPEdia (Aug. 25, 2009), [http://www.ballotpedia.org/wiki/index.php/Americans\\_for\\_Limited\\_Government](http://www.ballotpedia.org/wiki/index.php/Americans_for_Limited_Government); Dan Whipple, *Property-Rights Initiatives Threaten Environmental Protections in Four Western States*, GRIST (Oct. 16, 2006), <http://www.grist.org/article/whipple>. Even though some of these initiatives do not directly permit government officials to waive applicable land use laws, most would interpret them to do so to avoid paying an insurmountable amount of money to burdened property owners. See generally Echeverria & Hansen-Young, *supra*.

<sup>19</sup> *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996); *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22 (1977) ("The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.").

by the Supreme Court of the United States to protect a state's ability to enact legislation necessary to preserve the public welfare, allows a state to modify or rescind existing contracts that interfere with its ability to exercise essential sovereign responsibilities.<sup>20</sup> Since enacting legislation that ensures proper land use is an essential state responsibility, the reserved powers doctrine is a powerful, yet unexplored, method for protecting important state land use regulations—and ultimately, the public interest.

## I

### BACKGROUND: OREGON'S LAND USE SYSTEM

Oregon has been a leader in the field of land use planning for decades.<sup>21</sup> The foundation of Oregon's comprehensive, statewide land use planning system was laid in 1973, when the Oregon legislature passed the landmark Senate Bill 100.<sup>22</sup> Senate Bill 100 was the legislature's response to Governor Tom McCall's powerful speech condemning "sagebrush subdivisions, coastal condomania, and the ravenous rampages of suburbia" and his request for legislation to establish a statewide program for land use planning.<sup>23</sup> To ensure effective administration of the state's new land use system, Senate Bill 100 created an agency to coordinate land use planning—the Department of Land Conservation and Development—to be directed by the Land Conservation and Development Commission.<sup>24</sup> In 1979, the Oregon legislature strengthened its land use system even further by creating the Land Use Board of Appeals, which has exclusive jurisdiction to review all legislative and quasi-judicial land use decisions in the state.<sup>25</sup>

One of the most notable effects of Senate Bill 100 was that it gave the newly formed Land Conservation and Development Commission

---

<sup>20</sup> 16B AM. JUR. 2D *Constitutional Law* § 755 (2010).

<sup>21</sup> See Or. Dep't of Land Conservation & Dev., History of Oregon's Land Use Planning, OREGON.GOV, <http://www.oregon.gov/LCD/history.shtml> (last visited Apr. 26, 2011).

<sup>22</sup> See S.B. 100, 1973 Leg., 57th Reg. Sess., 1973 Or. Laws 80 (Or. 1973) (codified as amended at OR. REV. STAT. § 197 (2005)), available at <http://www.oregon.gov/LCD/docs/bills/sb100.pdf>.

<sup>23</sup> Or. Dep't of Land Conservation & Dev., *supra* note 21.

<sup>24</sup> S.B. 100, § 5.

<sup>25</sup> See OR. REV. STAT. §§ 197.805–197.860; Land Use Bd. of Appeals, *Welcome to the Land Use Board of Appeals*, OREGON.GOV, <http://www.oregon.gov/LUBA/index.shtml> (last visited Apr. 26, 2011).

authority to develop statewide planning goals and to ensure compliance with these goals.<sup>26</sup> These goals express Oregon's broad land use policies and are achieved through local comprehensive planning.<sup>27</sup> The Commission ultimately developed nineteen goals that fit into in four broad categories, goals that address (1) the planning process, (2) conservation, (3) development practices, and (4) coastal resources.<sup>28</sup>

The goals that have had the largest impact on land use in Oregon are Goals 3, 4, and 14.<sup>29</sup> Goal 3 requires that all agricultural lands within the state are preserved and maintained for farm use.<sup>30</sup> This goal severely limits rural landowners' ability to place dwellings on their properties and to use their properties for anything other than farming, since all local governments are required to zone agriculture land for exclusive farm use.<sup>31</sup> Goal 4 is similarly restrictive because it compels local governments to inventory, designate, and zone forest lands for mainly forest use.<sup>32</sup> Goal 14 supports Goals 3 and 4 by requiring local governments to designate urban growth boundaries that impose limits on all foreseeable urban development.<sup>33</sup> The land located within urban growth boundaries may be developed for urban commercial and residential use, while the land outside of the boundaries must remain rural agriculture and forest lands.<sup>34</sup>

---

<sup>26</sup> S.B. 100, § 11.

<sup>27</sup> Or. Dep't of Land Conservation & Dev., *Goals*, OREGON.GOV (Nov. 24, 2010), <http://www.oregon.gov/LCD/goals.shtml> (last visited Apr. 26, 2011).

<sup>28</sup> Blumm & Grafe, *supra* note 2, at 290. For the full text of each goal, see Or. Dep't of Land Conservation & Dev., *supra* note 27.

<sup>29</sup> See Blumm & Grafe, *supra* note 2, at 291.

<sup>30</sup> OR. DEP'T OF LAND CONSERVATION & DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES: GOAL 3: AGRICULTURAL LANDS 1, *available at* <http://www.oregon.gov/LCD/docs/goals/goal3.pdf> (codified as OR. ADMIN. R. § 660-015-0000(3) (1974)).

<sup>31</sup> Blumm & Grafe, *supra* note 2, at 292-93.

<sup>32</sup> OR. DEP'T OF LAND CONSERVATION & DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES: GOAL 4: FOREST LANDS 1, *available at* <http://www.oregon.gov/LCD/docs/goals/goal4.pdf> (codified as OR. ADMIN. R. § 660-015-0000(4) (1974)).

<sup>33</sup> OR. DEP'T OF LAND CONSERVATION & DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES: GOAL 14: URBANIZATION 1, *available at* <http://www.oregon.gov/LCD/docs/goals/goal14.pdf> (codified as OR. ADMIN. R. § 660-015-0000(14) (1974)); Blumm & Grafe, *supra* note 2, at 291.

<sup>34</sup> OR. DEP'T OF LAND CONSERVATION & DEV., *supra* note 33, at 3.

## II

### VOTERS' RESPONSE TO OREGON'S SYSTEM: MEASURE 37 AND MEASURE 49

Oregon's land use system was controversial from the beginning. Because the state legislature and the governor's office continually supported Oregon's approach to land use planning, most attacks on the planning system came from citizen initiatives.<sup>35</sup> Interest groups attempted to overhaul Oregon's system on three separate occasions within ten years of Senate Bill 100's adoption.<sup>36</sup> The attacks continued despite these failed attempts.<sup>37</sup> The 1998 ballot contained two initiatives that aimed to curtail the effects of Senate Bill 100 and provide more public involvement in land use regulation,<sup>38</sup> one of which successfully required government entities to provide notice to landowners of all proposed changes to land use regulations by mail.<sup>39</sup>

The most extreme attack on Oregon's land use system came from Ballot Measure 7,<sup>40</sup> an initiative very similar to Measure 37 that passed by an unofficial margin of fifty-four percent in the 2000 election.<sup>41</sup> Measure 7 broadened the scope of the Oregon Constitution's takings clause<sup>42</sup> to require government entities to compensate landowners for *any regulation* adopted after the current landowner purchased the property that restricted that owner's land use practices and reduced their property value.<sup>43</sup> Unlike Measure 37, Measure 7 did not contain an express provision allowing government entities to waive a land use regulation in lieu of compensation.<sup>44</sup> However, multiple local governments adopted controversial ordinances on their own accord after the approval of Measure 7 that

---

<sup>35</sup> Blumm & Grafe, *supra* note 2, at 296.

<sup>36</sup> *Id.* at 296–97.

<sup>37</sup> *Id.* at 298.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (discussing Oregon Ballot Measure 56 (1998) (codified as amended at OR. REV. STAT. § 215.503 (1999))).

<sup>40</sup> Amends Oregon Constitution: Requires Payment to Landowner if Government Regulation Reduces Property Value (Measure 7) (2000), *available at* <http://oregonvotes.org/nov72000/guide/mea/m7/m7.htm>.

<sup>41</sup> Blumm & Grafe, *supra* note 2, at 302.

<sup>42</sup> The takings clause of the Oregon Constitution states, "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation." OR. CONST. art. I, § 18.

<sup>43</sup> Blumm & Grafe, *supra* note 2, at 299.

<sup>44</sup> *Id.* at 300.

would allow them to waive offending land use regulations and avoid compensating claimants.<sup>45</sup>

Measure 7 had a very brief lifespan. In *League of Oregon Cities v. Oregon*, a group of local governments, land use organizations, and individuals challenged the Measure's constitutionality before it went into effect.<sup>46</sup> Their claim rested on the assertion that Measure 7 violated the "separate vote" provision of the Oregon Constitution, which requires voters to vote for each constitutional amendment individually.<sup>47</sup> In 2000, the plaintiffs were awarded a preliminary injunction, which effectively froze the implementation of Measure 7.<sup>48</sup> Soon after, the Marion County Circuit Court sided with the plaintiffs, granting their motion for summary judgment and declaring Measure 7 to be invalid.<sup>49</sup> The State appealed the decision to the Oregon Court of Appeals, which in turn certified the appeal to the Oregon Supreme Court.<sup>50</sup> In 2002, the Oregon Supreme Court upheld the Circuit Court's invalidation of Measure 7, agreeing that it violated the Oregon Constitution's separate vote requirement.<sup>51</sup> Despite the failure of Measure 7, property rights activists attempted to end the lengthy battle against Oregon's land use system in their favor once again with the campaign for Measure 37.

#### A. Measure 37

In November 2004, Oregon voters approved Ballot Measure 37, a bold initiative that dramatically altered land development rights within the state.<sup>52</sup> The referendum's success was in part due to the proponents of Measure 37 putting Dorothy English's face to the alleged harm caused by Oregon's land use system.<sup>53</sup> Ms. English, an elderly Oregon landowner who was unable to subdivide her twenty-acre lot to house her children and grandchildren and fund her

---

<sup>45</sup> *Id.* at 301.

<sup>46</sup> See *League of Or. Cities v. Oregon*, 334 Or. 645, 56 P.3d 892 (2002).

<sup>47</sup> *Id.* at 663–64 (discussing OR CONST. art. XVII § 1 ("When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.")).

<sup>48</sup> Blumm & Grafe, *supra* note 2, at 303.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *League of Or. Cities*, 334 Or. at 649, 676.

<sup>52</sup> Blumm & Grafe, *supra* note 2, at 279 (According to some scholars, Measure 37 is "the leading example of libertarian property in the world.").

<sup>53</sup> See Potapov, *supra* note 8, at 10,516–17.



retirement, symbolized Oregonians' general belief that the state land use planning system was overly restrictive.<sup>54</sup> In addition to Ms. English's story, Measure 37 advocates focused their campaign on discussions of fairness and simplicity, arguing that the government should pay for the land that it takes.<sup>55</sup> The campaign in favor of Measure 37 was extremely successful—the Measure passed by a margin of sixty-one percent and was approved in all but one of Oregon's thirty-six counties.<sup>56</sup>

Despite the calculated nature of the Measure 37 campaign, the law itself is exceptionally broad. Measure 37 introduced a “pay or waive” scheme that requires government entities to provide “just compensation” to property owners whenever a land use regulation restricts the use of their properties, thereby lowering the fair market value.<sup>57</sup> In lieu of paying compensation for land use restrictions, a government entity could choose to waive the regulation at issue and allow a property owner to freely develop land without regulation.<sup>58</sup> There were, however, exceptions. Five categories of land use regulations were statutorily exempt from Measure 37: Regulations that were enacted to address (1) common and historically recognized public nuisances, (2) public health and safety, (3) compliance with federal law, (4) pornography and nude dancing, and (5) regulations

---

<sup>54</sup> *Id.* at 10,516. The Measure 37 campaign highlighted many Oregon landowners “whose dreams of developing their land were allegedly thwarted by seemingly extreme or arbitrary government action.” Blumm & Grafe, *supra* note 2, at 306.

<sup>55</sup> Blumm & Grafe, *supra* note 2, at 306.

<sup>56</sup> *Id.* at 304; see also OR. SEC'Y OF STATE, GENERAL ELECTION ABSTRACT OF VOTES STATE MEASURE NO. 37 (Nov. 2, 2004), available at <http://www.oregonvotes.org/doc/history/nov22004/abstract/m37.pdf>

<sup>57</sup> Subsection 1 states:

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.

Measure 37, § 1 (2004).

<sup>58</sup> Subsection 8 states:

Notwithstanding any other state statute or the availability of funds . . . in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

*Id.* § (8).

enacted before a property owner or a family member of the owner acquired the land at issue.<sup>59</sup>

The wide scope and brief language<sup>60</sup> of Measure 37 led to many unanswered questions. First, the Measure's compensation requirement does not describe which government entities have jurisdiction to provide compensation to landowners and how these entities should calculate diminished property values.<sup>61</sup> The Measure's waiver provision is equally ambiguous. The language of Measure 37 does not effectively describe which government entities have authority to waive land use laws, and it does not address whether the waivers belong solely to the claimant or run with the land.<sup>62</sup> In response to these ambiguities, there were multiple judicial and legislative attempts to limit the scope of the Measure. One of the most notable cases was a group of landowners, farm bureaus, and nonprofit organizations' unsuccessful attempt to challenge the state and federal constitutionality of Measure 37.<sup>63</sup> In addition, both houses of the Oregon legislature introduced bills in the 2005 session to clarify the scope of Measure 37, none of which were successful.<sup>64</sup>

The seemingly limitless property rights granted by Measure 37 had a huge impact on the Oregon land use system. It abrogated the state's power to regulate a vast amount of valuable natural resources. According to one Measure 37 impact study, the law effectively disabled "the tools used over the past four decades to prevent sprawl and preserve agricultural and forest land in Oregon."<sup>65</sup> During the three years that Measure 37 was in force, there were 6857 Measure 37 claims, requesting a total of \$19.8 billion in compensation.<sup>66</sup> These

---

<sup>59</sup> *Id.* § (3)(A)–(E).

<sup>60</sup> Measure 37 consisted of 13 subsections and contained less than 1100 words. *See id.*

<sup>61</sup> Blumm & Grafe, *supra* note 2, at 320–23.

<sup>62</sup> *Id.* at 323–25; *see also* Potapov, *supra* note 8, at 10530–31.

<sup>63</sup> *See* MacPherson v. Dep't of Admin. Servs., 340 Or. 117 (2006).

<sup>64</sup> Blumm & Grafe, *supra* note 2, at 317–18 (discussing S.B. 1037, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3246, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3247, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3249, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3130, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3285, 73d Legis. Assemb., Reg. Sess. (Or. 2005); and S.B. 406, 73d Legis. Assemb., Reg. Sess. (Or. 2005)).

<sup>65</sup> Boulanger, *supra* note 15, at 324 (quoting SHEILA MARTIN & KATIE SHRIVER, THE INST. OF PORTLAND METRO. STUDIES, DOCUMENTING THE IMPACT OF MEASURE 37: SELECTED CASE STUDIES 4–5 (2006), available at [http://www.pdx.edu/sites/www.pdx.edu.ims/files/media\\_assets/ims\\_M37brainerreport.pdf](http://www.pdx.edu/sites/www.pdx.edu.ims/files/media_assets/ims_M37brainerreport.pdf)).

<sup>66</sup> Or. Dep't of Land Conservation & Dev., *Summaries of Measure 37 Claims Filed in the State* (Dec. 5, 2007), [http://www.oregon.gov/LCD/MEASURE49/summaries\\_of\\_m37\\_claims.shtml](http://www.oregon.gov/LCD/MEASURE49/summaries_of_m37_claims.shtml) (last visited Apr. 26, 2011).

claims included several large requests from timber companies, and about a third of all the claims requested sprawling residential subdivisions—exactly the kind of land uses that the Oregon legislature intended to limit with Senate Bill 100.<sup>67</sup> Moreover, eighty-five percent of claims were filed in counties located in western Oregon,<sup>68</sup> which houses some of the most valued agricultural and forest lands within the United States.<sup>69</sup> The government entities that processed these claims almost universally chose to waive the offending land use laws in lieu of paying compensation to claimants, paving the way for a massive amount of development.<sup>70</sup>

### ***B. Measure 49***

Three years after the enactment of Measure 37, Oregon voters realized the new law's implications and passed Measure 49.<sup>71</sup> This law was referred to voters by the 2007 legislature<sup>72</sup> and ratified with a sixty-one percent margin in the 2007 election.<sup>73</sup> Measure 49 modified Measure 37 by revising the language found in the original law and adding seven sections that addressed many of the unanswered questions left by Measure 37.<sup>74</sup> However, despite these changes, Measure 49 retained the core principle of Measure 37 that entitles

---

<sup>67</sup> Blumm & Grafe, *supra* note 2, at 358–59.

<sup>68</sup> Or. Dep't of Land Conservation & Dev., *supra* note 66.

<sup>69</sup> See generally Or. Dep't of Agric., *State of Oregon Agriculture*, OREGON.GOV, [http://www.oregon.gov/ODA/pub\\_bd\\_rpt.shtml](http://www.oregon.gov/ODA/pub_bd_rpt.shtml) (last updated Dec. 28, 2010).

<sup>70</sup> Blumm & Grafe, *supra* note 2, at 359.

<sup>71</sup> “Oregonians quickly caught on to the fact that the measure was really a guise for developers to gain the ability to develop high-value farm and forestland to make a quick profit.” Boulanger, *supra* note 15, at 327. According to Measure 49 advocates, most of the Measure 37 claims were submitted by large developers who would have constructed more than 2700 housing subdivisions on previously protected farm and forest land if their claims were approved. *Id.* at 327–28.

<sup>72</sup> H.B. 3540, 74th Leg., Reg. Sess. (Or. 2007), available at <http://www.leg.state.or.us/07reg/measpdf/hb3500.dir/hb3540.intro.pdf>. Oregon legislators decided to refer Measure 49 to the voters, rather than just voting on the bill themselves, because there were not enough House Democrats willing to vote for an outright legislative modification of Measure 37. Potapov, *supra* note 8, at 10,528.

<sup>73</sup> OR. SEC'Y OF STATE, SPECIAL ELECTION ABSTRACT OF VOTES: STATE MEASURE NO. 49 (Nov. 6, 2007), available at <http://www.oregonvotes.org/doc/history/nov62007/results.pdf>.

<sup>74</sup> See Measure 49 (2007). In upholding Measure 49 and explaining its effect, the Oregon Supreme Court stated that Measure 49 amended Measure 37 and “altered the claims and remedies available to landowners.” *Corey v. Dep't of Land Conservation & Dev.*, 344 Or. 457, 463, 184 P.3d 1109, 1112 (2008).

landowners to either just compensation or a regulatory waiver for property values diminished by land use regulations.<sup>75</sup>

Measure 49 established two separate standards for evaluating claims filed before and after June 28, 2007.<sup>76</sup> Landowners who filed their claims before June 28, 2007, are entitled to compensation in the form of residential development, depending on where their property is located.<sup>77</sup> Claimants who own property located in whole or in part within an urban growth boundary are entitled to build up to ten single-family dwellings.<sup>78</sup> If the property owner has an approved or pending Measure 37 claim, the owner is only entitled to the number of dwellings approved or sought in the original claim.<sup>79</sup> Also, the total fair market value of the home sites granted pursuant to Measure 49 cannot exceed the loss of fair market value caused by the appropriate regulation.<sup>80</sup> Finally, the property owner must show that residential use was the “highest and best use” for the property when the regulation was enacted<sup>81</sup> and that the property is currently zoned for residential use.<sup>82</sup>

By contrast, the number of home sites that claimants owning property outside of an urban growth boundary are entitled to depends on the characteristics of their land.<sup>83</sup> If a claimant’s property is located on high-value farmland or forest land or in a groundwater-restricted area, the claimant, under the “express option,”<sup>84</sup> is entitled to develop either the number of houses described in the original Measure 37 claim or three dwellings, whichever is fewer.<sup>85</sup> A claimant who already has three homes on such a property may be approved for one additional dwelling.<sup>86</sup>

---

<sup>75</sup> See Measure 49, § 4.

<sup>76</sup> This date was significant to the authors of Measure 49 because the 2007 regular session of the seventy-fourth Legislative Assembly adjourned on June 28, 2007. *Id.* § 5.

<sup>77</sup> See *id.* § 5(1)–(2).

<sup>78</sup> *Id.* § 9(1).

<sup>79</sup> *Id.* § 9(2)(a).

<sup>80</sup> *Id.* § 9(2)(c).

<sup>81</sup> *Id.* § 9(8).

<sup>82</sup> *Id.* § 9(5)(e).

<sup>83</sup> DEP’T OF LAND CONSERVATION & DEV., MEASURE 49 GUIDE 1 (Mar. 7, 2008), [http://www.oregon.gov/LCD/MEASURE49/docs/general/m49\\_guide.pdf](http://www.oregon.gov/LCD/MEASURE49/docs/general/m49_guide.pdf) (last visited Apr. 26, 2011).

<sup>84</sup> For more information on this option, see *id.* at 4–6.

<sup>85</sup> Measure 49, § 6(2)(a)–(b) (2007).

<sup>86</sup> *Id.* § 6(2)(b), (3).

If a claimant's property is not located on such restricted land, a claimant is entitled to four to ten home sites under the conditional option, as long as the original Measure 37 claim is for more than three dwellings.<sup>87</sup> A landowner will only be entitled to the number of homes cited in that owner's original Measure 37 claim.<sup>88</sup> If there are existing homes on the landowner's property, the claimant will be entitled to ten homes, including the existing dwellings.<sup>89</sup> In addition, the number of approved home sites is limited by the loss in fair market value caused by the applicable regulations, similar to properties located within urban growth boundaries.<sup>90</sup> There is a general cap on the amount of permissible home sites: Claimants are barred from obtaining more than twenty home site approvals, regardless of how many properties a person owns or how many claims a person has filed.<sup>91</sup> Finally, all claimants must file a form with the Department of Land Conservation and Development that describes whether they will proceed under the express or conditional option.<sup>92</sup>

Landowners who wish to file claims after June 28, 2007, may also be entitled to compensation. These claims must be based on land use regulations enacted after January 1, 2007, and must be filed within five years of the offending regulation's enactment.<sup>93</sup> Similar to the original Measure 37 requirements, Measure 49 requires government entities to provide either just compensation or waive the new land use regulations that restrict a claimant's property use.<sup>94</sup> However, unlike Measure 37, this portion of Measure 49 only provides relief when regulations limit either residential use, or farming or forestry practices.<sup>95</sup> Also, claimants are only entitled to relief that allows residential development with a value equivalent to the value lost by the offending regulations.<sup>96</sup>

If a property owner obtained a waiver under Measure 37, the owner can complete a development project if the land use complies with the

---

<sup>87</sup> *Id.* § 7(1); MEASURE 49 GUIDE, *supra* note 83, at 6–8.

<sup>88</sup> Measure 49, § 7(1).

<sup>89</sup> *Id.* § 7(2)(b).

<sup>90</sup> *Id.* § 7(2)(c).

<sup>91</sup> *Id.* § 11(5).

<sup>92</sup> *Id.* § 8(1), (3).

<sup>93</sup> *Id.* §§ 12(1)(c), 13(4).

<sup>94</sup> *Id.* § 12(5)(a)–(b).

<sup>95</sup> *Id.* § 12(1)(b).

<sup>96</sup> *Id.* § 12(2).

terms of the waiver and if the claimant has a vested right to complete and continue the use.<sup>97</sup> A vested right is a development project that is already under construction and is inconsistent with a zoning ordinance. Such projects may be completed under the nonconforming use designation because the property owner took substantial steps towards developing that use prior to the enactment of the regulation.<sup>98</sup> Measure 49 clearly allows claimants who have fully completed a development permitted by their Measure 37 waiver to continue their lawful use.<sup>99</sup> However, if a claimant has completed only part of a development, the claimant can only complete the project with a vested right under common law.<sup>100</sup>

Oregon courts have consistently stated that vested right determinations are factual issues that will be decided on a case-by-case basis.<sup>101</sup> An owner must have at least “partially completed any ‘use described in the waiver’” to obtain a common law vested right.<sup>102</sup> It is unclear how much development a property owner must have “partially” completed to have a vested Measure 37 claim.<sup>103</sup> However, Oregon appellate courts have considered a number of factors to determine when a vested right exists in contexts outside of Measures 37 and 49, including (1) the amount of money spent on developing a land use in relation to the total cost of establishing the use; (2) the type, location, and cost of the property use; and (3) whether the owner’s acts are beyond just mere preparation for development.<sup>104</sup> Depending on where a property is located, the local city, county, or circuit court would have authority to determine whether a land use is vested at common law.<sup>105</sup>

---

<sup>97</sup> *Id.* § 5(3).

<sup>98</sup> *Clackamas Cnty. v. Holmes*, 265 Or. 193, 197, 508 P.2d 190, 192 (1973) (“The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted.”).

<sup>99</sup> Measure 49, § 5(3).

<sup>100</sup> OR. DEP’T OF LAND CONSERVATION AND DEV. & OR. DEP’T OF JUSTICE, BALLOT MEASURE 49 AND THE COMMON LAW OF VESTED RIGHTS 1 (Dec. 31, 2007), available at <http://www.oregon.gov/LCD/docs/measure37/m37vestedrightsguidance010108.pdf>.

<sup>101</sup> *Id.* at 1–2 (citing *Clackamas Cnty. v. Holmes*, 265 Or. at 197).

<sup>102</sup> *Corey v. Dep’t of Land Conservation & Dev.*, 344 Or. 457, 466 (2008).

<sup>103</sup> Boulanger, *supra* note 15, at 333–34.

<sup>104</sup> OR. DEP’T OF LAND CONSERVATION AND DEV. & OR. DEP’T OF JUSTICE, *supra* note 100, at 2.

<sup>105</sup> OR. DEP’T OF LAND CONSERVATION AND DEV., MEASURE 49: FREQUENTLY ASKED QUESTIONS 2 (Aug. 4, 2010), available at [http://www.oregon.gov/LCD/MEASURE49/docs/general/m49\\_faq.pdf](http://www.oregon.gov/LCD/MEASURE49/docs/general/m49_faq.pdf).

### III

#### THE CONTRACT CLAUSE AND ITS IMPLICATIONS

Oregon successfully curbed many of the harmful implications of Ballot Measure 37 with the adoption of Ballot Measure 49. However, one major question remained: Did Measure 49 retroactively cancel or modify the regulatory waivers granted pursuant to Measure 37? The courts were divided. According to Judge Owen M. Panner's decision in *Citizens for Constitutional Fairness v. Jackson County (Citizens I)*, these waivers were binding, constitutionally protected contracts that could not be altered by Measure 49.<sup>106</sup> However, on July 20, 2010, the Ninth Circuit Court of Appeals reversed the lower court in its *Citizens for Constitutional Fairness v. Jackson County (Citizens II)* ruling and concluded that the Measure 37 waivers did not create a contract between the state and landowner claimants.<sup>107</sup> The foundation of both decisions stems from the Contract Clause of the U.S. Constitution.<sup>108</sup>

##### A. *The Language and Scope of the Contract Clause*

The Contract Clause provides, "No state shall . . . pass any . . . Law impairing the Obligation of Contracts."<sup>109</sup> In addition to prohibiting the impairment of contracts between private parties, the Contract Clause similarly prohibits a state from impairing its own contractual obligations with other parties.<sup>110</sup> In the latter circumstance, a private party can state a federal cause of action pursuant to the Contract Clause by alleging that he or she has a contract with the state<sup>111</sup> that the state, through its legislative authority, has impaired.<sup>112</sup> In order for a claim to be successful, a plaintiff must show that (1) a state law substantially impairs a contractual relationship, (2) the state did not have a "significant and legitimate public purpose" for the regulation,

---

<sup>106</sup> *Citizens for Constitutional Fairness v. Jackson Cnty.*, 2008 WL 4890585, at \*3 (D. Or. Nov. 12, 2008).

<sup>107</sup> *Citizens for Constitutional Fairness v. Jackson Cnty.*, 388 F.App'x 710, 711 (9th Cir. July 20, 2010).

<sup>108</sup> *See id.*; *Citizens for Constitutional Fairness*, 2008 WL 4890585, at \*2-4.

<sup>109</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>110</sup> *See* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

<sup>111</sup> *See* *Mun. Investors Ass'n v. Birmingham*, 316 U.S. 153, 157 (1942) (A contractual obligation "must exist before it can be impaired.")

<sup>112</sup> *City Ry. Co. v. Citizens' St. R.R. Co.*, 166 U.S. 557, 563 (1897).

and (3) if such a public purpose exists, the law is not reasonable and appropriate for the intended purpose.<sup>113</sup>

Despite the seemingly broad language of the Contract Clause, it has not been interpreted to bar the impairment of all contracts. Shortly after the Supreme Court established that the Contract Clause prohibits a state from impairing its own contractual obligations, the Court also recognized that this broad application of the Contract Clause could impede a state's ability to enact measures that are necessary for a state to carry out its sovereign responsibilities.<sup>114</sup> As the Supreme Court gradually limited the scope of the Contract Clause in a series of cases, it is now well settled law that the Contract Clause does not operate to destroy the police powers of the states.<sup>115</sup> States enjoy broad authority to legislate pursuant to their police powers—they are free to act to promote the public welfare<sup>116</sup> and protect the lives, health, morals, comfort, and safety of the public.<sup>117</sup> As noted by the Supreme Court, “literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection.”<sup>118</sup>

---

<sup>113</sup> *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983).

<sup>114</sup> Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 121 (citing *United States v. Winstar Corp.*, 518 U.S. 839, 874 (1996)).

<sup>115</sup> *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22 (1977) (“The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.”).

<sup>116</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 472 (1987) (“The Contracts Clause has not been read literally to obliterate valid exercises of the States’ police power to protect the public health and welfare.”); *Minn. Ass’n of Health Care Facilities, Inc. v. Minn. Dep’t of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985).

<sup>117</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) (“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public . . . . This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.” (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905))).

<sup>118</sup> *Allied Structural Steel Co.*, 438 U.S. at 240 (quoting *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934) (internal quotation omitted)).



**B. Citizens I and II:*****Applying the Contract Clause to Measure 37 Waivers***

In *Citizens I*, Judge Panner employed the Contract Clause of the United States Constitution to analyze whether Measure 49 had a retroactive effect on the land use regulation waivers granted to landowners pursuant to Measure 37.<sup>119</sup> In this case, multiple property owners had obtained Measure 37 waivers from Jackson County.<sup>120</sup> The County agreed to disregard the zoning requirements imposed after the plaintiffs acquired their properties, which allowed them to build homes and commercial properties.<sup>121</sup> The County later decided that it would not honor these waivers after Oregon voters passed Measure 49, because it construed Measure 49 to effectively nullify the waivers.<sup>122</sup> In response, the property owners brought an action against Jackson County and Danny Jordan, the County's chief administrative officer, in federal court.<sup>123</sup>

Relying on the Contract Clause, the court controversially held that Jackson County may not use Measure 49 "as an excuse to avoid its obligations under plaintiffs' Measure 37 waivers" because the waivers are "binding, constitutionally protected contracts between plaintiffs and Jackson County."<sup>124</sup> To arrive at this conclusion, the court first determined that the waivers created a contract between the parties because there was mutual consideration,<sup>125</sup> as required by Oregon law.<sup>126</sup> Since the waivers were valid contracts, Jackson County's refusal to honor the waivers was "obviously" a substantial impairment of the contracts at issue.<sup>127</sup>

---

<sup>119</sup> *Citizens for Constitutional Fairness v. Jackson Cnty.*, 2008 WL 4890585, at \*2–4 (D. Or. Nov. 12, 2008).

<sup>120</sup> Jackson County issued waivers to the claimants because the Board of County Commissioners determined that the County could not afford to provide monetary compensation. *Id.* at \*1.

<sup>121</sup> Eric Mortenson, *Federal Judge Puts the Brakes on His Own Measure 37 Land-Use Ruling*, OREGONIAN, Feb. 5, 2009, available at [http://www.oregonlive.com/environment/index.ssf/2009/02/federal\\_judge\\_puts\\_the\\_brakes.html](http://www.oregonlive.com/environment/index.ssf/2009/02/federal_judge_puts_the_brakes.html).

<sup>122</sup> *Citizens for Constitutional Fairness*, 2008 WL 4890585 at \*2.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*2, \*3.

<sup>125</sup> The court determined that the plaintiffs' consideration was agreeing to drop their claims for monetary compensation and that the County's consideration was its waiver of the otherwise applicable zoning regulations. *Id.* at \*3.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

The court assumed that Oregon had a significant and legitimate public purpose for enacting Measure 49, without identifying the assumed purpose.<sup>128</sup> Nevertheless, the court declared that Measure 49 went beyond the state's intended purpose because Jackson County's interpretation of Measure 49 eliminated, rather than just modified, the plaintiffs' contractual rights, which in turn violated the Contract Clause.<sup>129</sup> Based on this analysis, the court concluded that "Measure 49 does not apply to plaintiffs' Measure 37 waivers."<sup>130</sup> The court made sure to note that its ruling did not give the plaintiffs free reign to develop their property: "Just as Jackson County must honor its obligations under the Measure 37 waivers . . . plaintiffs must comply with the conditions imposed by the waivers, which include applicable zoning restrictions."<sup>131</sup>

Judge Panner's decision completely undercut the positive effects of Measure 49 on Oregon's land use system. Under this ruling, the regulatory waivers obtained by property owners pursuant to Measure 37—waivers that authorized development typically impermissible under Oregon land use laws—remained fully enforceable notwithstanding the adoption of Measure 49.<sup>132</sup> This interpretation of the two initiatives would have drastically altered Oregon's rural landscape, because Measure 37 authorized a level of development that had never been experienced by the state.<sup>133</sup> In the three years that Measure 37 was in effect, Jackson County alone issued 571 waivers to landowners, allowing unrestrained development on 60,000 acres.<sup>134</sup> According to a study conducted by Washington County, the limits imposed by Measure 49 on all approved Measure 37 development claims resulted in a loss of more than eighty percent of residential homes that were otherwise permissible pursuant to Measure 37 waivers.<sup>135</sup>

---

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* The court also held, in the alternative, that Measure 37 waivers are final quasi-judicial orders. *Id.* at \*4. According to Judge Panner, this holding bars Measure 49, a legislative act, from rescinding the quasi-judicial waivers without violating the separation of powers. *Id.* An analysis of this holding is outside the scope of this Article.

<sup>131</sup> *Id.*

<sup>132</sup> Mortenson, *supra* note 121.

<sup>133</sup> See Or. Dep't of Land Conservation & Dev., *supra* note 66.

<sup>134</sup> Damian Mann, *Court Strikes Decision on Measure 37 Development Waivers*, ASHLAND DAILY TIDINGS, July 21, 2010, <http://www.dailytidings.com/apps/pbcs.dll/article?AID=/20100721/NEWS02/7210311>.

<sup>135</sup> Boulanger, *supra* note 15, at 328.

The Ninth Circuit Court of Appeals, however, prevented this upheaval of Oregon's calculated land use system when it reversed Judge Panner's decision on July 20, 2010, in *Citizens II*. In an unpublished two paragraph memorandum, the Ninth Circuit quickly concluded that the plaintiffs failed to assert a Contract Clause violation because the Measure 37 waivers by themselves are not contracts, nor do the waivers prove the existence of a contract between the state of Oregon and landowner claimants.<sup>136</sup> The court reasoned that waivers are not contracts because they "do not show that there was any offer by Jackson County, acceptance by the property owners or consideration."<sup>137</sup> Furthermore, the court reasoned that the face of the waivers disavow any promise to property owners.<sup>138</sup>

Due to the Ninth Circuit's brief analysis, the full scope of *Citizens II* remains somewhat unclear. *Citizens II* does not address whether the plaintiffs have a common law vested right to complete and continue the property use described in their waivers. If the plaintiffs have vested rights, they may be entitled to continue development simply due to the existence of their vested rights, as opposed to the mere existence of their waivers.<sup>139</sup> This outcome would result in more development in rural Oregon than intended by Measure 49 proponents. Also, the vast majority of Measure 37 claimants have already accepted their development rights permitted under Measure 49, potentially lessening the impact of the Ninth Circuit's decision.<sup>140</sup>

#### IV

##### THE RESERVED POWERS DOCTRINE:

##### A JUSTIFICATION FOR THE IMPAIRMENT OF STATE CONTRACTS

As discussed in Part III.A, it is well-settled law that the Contract Clause of the U.S. Constitution is not absolute. One way that the Supreme Court has expressed this principle is by developing the reserved powers doctrine, a common law tool that can be employed

---

<sup>136</sup> *Citizens for Constitutional Fairness v. Jackson Cnty.*, 2010 WL 2836106 at \*1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* All Measure 37 waivers issued in Jackson County contained a disclaimer stating, "Jackson County does not promise Claimant(s) that Claimant(s) will eventually be able to put the property to any particular use." *Id.*

<sup>139</sup> See Measure 49 § 5(3) (codified as amended at OR. REV. STAT. § 195.305 (2007)).

<sup>140</sup> Potapov, *supra* note 8, at 10525 (citing Edward Sullivan & Carrie Richter, *Commentary: Straightening Out Measure 37, 49: A Bump in the Road for Oregon Land Use Planning*, DAILY J. COM., Dec. 11, 2008).

by courts to invalidate harmful government contracts or to protect a state's ability to enact legislation necessary to fulfill its essential sovereign responsibilities. Under the reserved powers doctrine, a state is forbidden from contracting away any of its essential sovereign powers.<sup>141</sup> This doctrine makes state contractual obligations—even if unmistakably clear—nonbinding if the obligations hinder the future exercise of an essential sovereign power, such as the use of state police powers to pass legislation that protects the public interest.<sup>142</sup> Because these contractual obligations are nonbinding, a state can later repudiate its promise without violating the Contract Clause.

Applying this principle, regulatory waivers granted to property owners pursuant to Measure 37 or any other “pay or waive” scheme can be modified by subsequent government actions, either through a citizen-led initiative such as Measure 49 or by traditional legislation. Even though the Ninth Circuit ultimately concluded that Measure 37 waivers could be altered or revoked because they are not contracts, the court should have employed the reserved powers doctrine to strengthen its conclusions and provide precedent for other states seeking to protect the enforcement of land use regulations. If other courts are faced with cases similar to *Citizens for Constitutional Fairness v. Jackson County* and interpret the regulatory waivers at issue to be irrevocable contracts, these rulings would be extremely detrimental to states—and would effectively bar government entities from regulating land use practices. This is an impermissible interpretation of regulatory waivers. The ability to regulate land use is one of the many powers that states possess as sovereigns, and is a power essential to protecting the public welfare through suitable planned development.<sup>143</sup>

---

<sup>141</sup> *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996); *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 23 (1977).

<sup>142</sup> *U.S. Tr. Co.*, 431 U.S. at 23 (declaring that “the Contract Clause does not require a state to adhere to a contract that surrenders an essential attribute of its sovereignty”). “[T]he reservation of essential attributes of sovereign power is read into [state] contracts as a postulate of the legal order.” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 435 (1934).

<sup>143</sup> The adoption of planning and zoning laws is one way that states exercise their police power. 101A C.J.S. *Zoning & Land Planning* § 8 (2010). States inherently have the authority to “enact laws for the safety, health, morals, convenience, comfort, prosperity, or general welfare of the people.” *Id.* Although land use regulations operate locally, they derive from the police power of the state. *Id.*

### A. *The Evolution of the Reserved Powers Doctrine*

The basic contours of the reserved powers doctrine were gradually developed by courts throughout the nineteenth century.<sup>144</sup> As noted by Professor Wright, “during the decades preceding 1878 the state courts were repeatedly enunciating the principle that there were some subjects over which the regulatory or even the repealing power of the legislatures continued in effect, regardless of the previous grants by state or local authorities.”<sup>145</sup> The Supreme Court of Massachusetts was the first court to use some form of the reserved powers language to explain its holding.<sup>146</sup> In that case, the court sustained the state legislature’s repeal of a statute that granted an exemption from military service because of the strong public interest in favor of providing an army.<sup>147</sup> Soon after, the Supreme Court of New York used the reserved powers language to justify upholding a city ordinance that forbade the use of certain lands for burial grounds, despite a prior conveyance of lands for that purpose.<sup>148</sup>

The Supreme Court of the United States did not explicitly acknowledge the reserved powers doctrine until 1877.<sup>149</sup> In *Beer Company v. Massachusetts*, the Court upheld a state law that prohibited the production and sale of alcohol, despite the law’s alleged interference with a charter previously granted to the Boston Beer Company.<sup>150</sup> Although the Court upheld the law on other grounds, the Court announced the reserved powers doctrine by stating, “As the police power of a State extends to the protection of the lives, health, and property of her citizens, the maintenance of good order, and the preservation of the public morals, the legislature cannot, by any contract, divest itself of the power to provide for these objects.”<sup>151</sup> The Supreme Court reiterated this doctrine three years

---

<sup>144</sup> See BENJAMIN FLETCHER WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 195–203 (1938).

<sup>145</sup> *Id.* at 197.

<sup>146</sup> *Commonwealth v. Bird*, 12 Mass. 443, 446 (1815) (declaring “We are not prepared to say that any one set of legislators can control their successors . . . in a case of such vital importance to the Commonwealth”).

<sup>147</sup> *Id.* at 447.

<sup>148</sup> *Corp. of Brick Presbyterian Church v. Mayor of N.Y.C.*, 5 Cow. 538, 540 (N.Y. 1826) (stating that the city did not have the power to enter into a contract “which should control or embarrass their legislative powers and duties”).

<sup>149</sup> See *Beer Co. v. Massachusetts*, 97 U.S. 25 (1878).

<sup>150</sup> *Id.* at 29.

<sup>151</sup> *Id.*

later in *Stone v. Mississippi*, a case that provides the “classic example”<sup>152</sup> of the reserved powers limitation on the Contract Clause.<sup>153</sup> In this case, the Court unanimously sustained the state legislature’s revocation of a twenty-five-year charter for a lottery franchise.<sup>154</sup> The Court justified the impairment of the corporation’s franchise agreement by explaining that lotteries are subject to regulation under a state’s police power because they affect public health and morals.<sup>155</sup>

Subsequent to *Stone v. Mississippi*, the Supreme Court expanded the reserved powers doctrine by applying it to protect the future exercise of state police powers to promote other public interests, including public welfare.<sup>156</sup> In *Illinois Central Railroad Company v. Illinois*, the Supreme Court upheld the state legislature’s revocation of a grant of submerged state land to a railroad company on the basis of the reserved powers doctrine.<sup>157</sup> The Court rejected the company’s argument that the revocation violated the Contract Clause “[b]ecause the reserved powers doctrine rendered the grant of submerged land nonbinding, a later session of the Illinois legislature could revoke it without violating the Contract Clause.”<sup>158</sup> In forming its conclusion, the Court made clear that “[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”<sup>159</sup>

In *Illinois Central*, the Supreme Court heavily relied on *Newton v. Commissioners*—a case in which the Court ruled that Ohio legislation relocating a county seat did not impair the contractual obligation of an earlier Ohio legislature because of the reserved powers doctrine—to justify extending the reserved powers doctrine to the Illinois

---

<sup>152</sup> *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996).

<sup>153</sup> *Stone v. Mississippi*, 101 U.S. 814, 817 (1880) (reasoning that “the legislature cannot bargain away the police power of a State”).

<sup>154</sup> *Id.* at 819.

<sup>155</sup> *Id.* at 818–19.

<sup>156</sup> *See* *Atl. Coast Line R.R. v. Goldsboro*, 232 U.S. 548, 558 (1914) (declaring that the Contract Clause does not prevent new “regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community”). *See also* *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 459 (1892), and *Newton v. Mahoning Cnty. Comm’rs*, 100 U.S. 548, 559 (1879).

<sup>157</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 463–64.

<sup>158</sup> *Grant*, *supra* note 114, at 128.

<sup>159</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 453.

legislature's grant of submerged land.<sup>160</sup> The *Illinois Central* Court applied the reserved powers doctrine to justify the legislature's revocation because to the protection of submerged lands is a matter of public welfare. To begin the Court's reasoning, Justice Field explained the historical and continual importance of navigable waters to commerce.<sup>161</sup> Because navigable waters and the lands underneath them are "subject[s] of public concern to the whole people of the State,"<sup>162</sup> Justice Field concluded that inalienability "follows necessarily from the public character of the property."<sup>163</sup>

The Supreme Court has continued to apply the reserved powers doctrine in modern cases involving the Contract Clause, but these cases are rare.<sup>164</sup> The reserved powers language used by the Court has not changed substantively.<sup>165</sup> However, the Court has refined the language that it uses to express the doctrine by declaring that the doctrine prevents states from surrendering "essential attributes of sovereign power" so that the state "continues to possess authority to safeguard the vital interests of its people."<sup>166</sup>

Despite the trend towards applying the reserved powers doctrine to protect exercises of state police powers in various contexts, the Supreme Court has typically limited the application of the doctrine to

---

<sup>160</sup> *Id.* at 458–59. The Supreme Court interpreted *Newton* to hold that:

[T]here could be no contract and no irrevocable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment, neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

*Id.* at 459.

<sup>161</sup> *Id.* at 458.

<sup>162</sup> *Id.* at 455.

<sup>163</sup> *Id.* at 456. The Court went on to state:

The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use *affects the public welfare*. It is therefore appropriately within the exercise of the police power of the state.

*Id.* at 459 (emphasis added).

<sup>164</sup> Grant, *supra* note 114, at 132.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434, 435 (1934)).

cases that do not involve the impairment of state financial obligations. The Court's rationale for this limitation on the reserved powers doctrine is that applying the doctrine to the government's financial obligations would compromise the public sector's ability to obtain the credit that it needs to operate.<sup>167</sup> For example, in *United States Trust Company of New York v. New Jersey*, the Court held that the statutory repeal of a covenant that limited subsidies for rail passenger transportation was unconstitutional and not justified by the reserved powers doctrine.<sup>168</sup> In forming this conclusion, the Court noted that "states are bound by their debt contracts."<sup>169</sup> Since the case involved a state obligation that was "purely financial," the covenant did not "fall within the reserved powers that cannot be contracted away."<sup>170</sup> Despite this holding, the Court made clear that the "Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations . . . an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."<sup>171</sup>

***B. Applying the Reserved Powers Doctrine  
to Protect State Land Use Regulations***

The reserved powers doctrine is a powerful, yet unexplored, tool for protecting state land use regulations across the country. Oregon is not the only state where the regulation of land use has been threatened by fanatic property rights activists. Prior to Oregon's Measure 37, four states—Florida, Louisiana, Mississippi, and Texas—already had government compensation requirements on the books.<sup>172</sup> Subsequent to Measure 37's enactment in 2004, property rights activists across the country attempted to convince citizens to adopt government compensation requirements in their own states. In 2006 alone, activists in six states—Montana, Missouri, California, Washington, Idaho, and Oklahoma—attempted to require their governments to provide monetary compensation for applicable land use regulations

---

<sup>167</sup> *Id.* at 130–31 (interpreting *United States v. Winstar Corp.*, 518 U.S. 839, 883–884 (1996)).

<sup>168</sup> *U.S. Tr. Co.*, 431 U.S. at 32.

<sup>169</sup> *Id.* at 24.

<sup>170</sup> *Id.* at 24–25.

<sup>171</sup> *Id.* at 25.

<sup>172</sup> See generally Echeverria & Hansen-Young, *supra* note 18. Interestingly, all of these laws were enacted in 1995. *Id.* at 447, 516, 518.



with citizen-petitioned initiatives.<sup>173</sup> Most of these initiatives contained an express regulatory waiver provision, and many were interpreted to allow governments to waive the offending land use laws to avoid paying an insurmountable sum of money to affected landowners.<sup>174</sup> In the event that government entities choose to modify or void binding waivers issued pursuant to initiatives that survived the voting process, government entities should invoke the reserved powers doctrine to protect their decisions, and ultimately, their state land use laws.

It is clear that the reserved powers doctrine precludes interpreting regulatory waivers granted pursuant to Measure 37, or any other government compensation requirement, as irrevocable contracts. As seen above, the reserved powers doctrine is a standard exception to the Contract Clause that protects a state's ability to modify or withdraw from contracts that interfere with essential attributes of sovereign power. One attribute of sovereign power that the doctrine protects is the exercise of state police powers to protect important public interests. A state's ability to withdrawal from contracts such as regulatory waivers, and to pass legislation such as Measure 49, is essential to its exercise of sovereign power:

[T]here could be no contract and no irrepealable law upon government subjects . . . every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment, -neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that *it is vital to the public welfare that each one should be able to, at all times, to do whatever the varying circumstances and present exigencies attending the subject may require*; and that a different result would be fraught with evil.<sup>175</sup>

States with government compensation requirements must be able to protect the public interest by retaining the power to modify or rescind regulatory waivers. This control over binding state commitments is essential to avoid repeating Oregon's frantic struggle to protect natural resources from unruly development during the three years that Measure 37 was in effect.

---

<sup>173</sup> Whipple, *supra* note 18. Out of the six states with Measure 37-like initiatives on the 2006 ballot, Arizona was the only state to actually adopt a pay or waive scheme. Echeverria & Hansen-Young, *supra* note 18, at 521.

<sup>174</sup> See generally Echeverria & Hansen-Young, *supra* note 18.

<sup>175</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 459 (emphasis added).

In the event that courts in states other than Oregon interpret regulatory waivers to be binding contracts, the case law surrounding the reserved powers doctrine supports the conclusion that regulatory waivers are revocable. The reserved powers doctrine renders such waivers revocable because a state's contractual obligations under regulatory waivers are not "purely financial." For example, if Oregon's obligations were purely financial, *United States Trust Company of New York v. New Jersey* would have precluded the application of the reserved powers doctrine.<sup>176</sup> It is true that the Measure 37 waivers obligated the state to waive land use regulations that restricted development on claimants' properties as a form of just compensation. However, the state also had an obligation to Oregonians who did not obtain Measure 37 waivers—an obligation to protect the public welfare. Even if a court interpreted the Measure 37 waivers to be purely of a financial nature, the Supreme Court has made clear that the "Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations . . . . [A]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."<sup>177</sup> The state must "continue[] to possess authority to safeguard the vital interests of its people" at all costs.<sup>178</sup> If other courts interpret regulatory waivers as binding contracts, the contractual impairments caused by subsequent government decisions, legislation, or initiatives would certainly be reasonable and necessary to serve the important public purpose of safeguarding a state's land use system, outshining the government's financial obligations.

Moreover, the enactment of subsequent legislation such as Measure 49 to limit the scope of compensation requirements is a valid exercise of a state's police power because such actions are necessary to protect the public welfare. As noted by Professor Grant, "the [reserved powers] doctrine applies only to . . . exercises of the police power that affect public matters reaching some threshold of importance to the best interests of society."<sup>179</sup> States enjoy broad authority to legislate pursuant to their police powers—they are free to act to promote the

---

<sup>176</sup> *U.S. Tr. Co.*, 431 U.S. at 24–25.

<sup>177</sup> *Id.* at 25.

<sup>178</sup> *Id.* at 15 (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434, 435 (1934)).

<sup>179</sup> Grant, *supra* note 114, at 132 (summarizing the general principles articulated by cases that apply the reserved powers doctrine).

public welfare<sup>180</sup> and to protect the lives, health, morals, comfort, and safety of the public.<sup>181</sup> The regulation of private land use in order to protect natural resources is included in the long list of valid exercises of state police powers.<sup>182</sup> As stated by Justice Brennan in his dissent to *Nollan v. California Coastal Commission*, “[t]here can be no dispute that the police power of the States encompasses the authority to impose conditions on private development.”<sup>183</sup> The scope of land use regulations permitted under a state’s police power are extensive, ranging from scenic and residential zoning to landmark preservation.<sup>184</sup> Therefore, this broad power to regulate land use surely includes the right to enact legislation such as Measure 49 that reasonably limits the amount of development that can occur on private properties located within sensitive rural areas that are rich in natural resources.

In Oregon’s case, Measure 37 had a considerable negative effect on the state’s land use system. The development permitted by Measure 37 waivers threatened to deplete the valuable farm and forest lands that the state had fought so hard to protect over the past three decades. The Oregon legislature had no choice but to enact Measure 49 to protect the natural resources that Oregonians depend on for their

---

<sup>180</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 472 (1987) (“The Contracts Clause has not been read literally to obliterate valid exercises of the States’ police power to protect the public health and welfare.”); *Minn. Ass’n of Health Care Facilities, Inc. v. Minn. Dep’t of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985).

<sup>181</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) (“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public . . . . This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.” (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905))).

<sup>182</sup> See *Manigault*, 199 U.S. at 481–83 (holding that a state’s action to build a dam, in spite of a prior private contract between landowners not to build, was a proper exercise of the state’s police power because private interests were subservient to the state’s power to provide for the general welfare and reclamation of the land and surrounding environment).

<sup>183</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 843 (1987) (citing, as examples, *Agins v. Tiburon*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104 (1978); *Gorieb v. Fox*, 274 U.S. 603 (1927)).

<sup>184</sup> *Id.* at 834–835 (J. Scalia majority opinion) (citing *Agins v. Tiburon*, 447 U.S. at 260–62; *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. at 127; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); Laitos & Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 66 (1987)).

livelihood and survival. The legislative findings that accompany Measure 49 prove that this was the state's mindset: "The purpose of [Measure 49] is to modify Ballot Measure 37 (2004) to ensure that Oregon law provides just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources."<sup>185</sup> Accordingly, the history of the Contract Clause and the reserved powers doctrine provide states with a viable means of protecting themselves from harmful government compensation requirements in the event that they face endless regulatory waivers of their own.

## V CONCLUSION

Citizen-led initiatives to protect private property by requiring government entities to compensate landowners for burdensome land use regulations are here to stay. In the event that courts are confronted with cases similar to *Citizens for Constitutional Fairness v. Jackson County* in the future, the reserved powers doctrine should be invoked to ensure protection of valuable state land use regulations. Under the theory presented in this Article, the reserved powers doctrine provides a court with authority to interpret regulatory waivers issued in lieu of government compensation as revocable contracts. This interpretation will allow states to maintain their essential sovereign power to pass regulations in the name of the public interest that put a cap on unrestrained—and ultimately extremely harmful—development of natural resources and rural lands.

---

<sup>185</sup> Measure 49 § 3 (codified as amended at OR. REV. STAT. § 195.301(2) (2007)).