REBEKAH R. COOK*

Incomprehensible, Uncompensable, Unconstitutional: The Fatal Flaws of Measure 37

Swayed by promises of bringing fairness back into Oregon's land-use planning system,[1] 60 percent of Oregon voters approved Measure 37 in November 2004.[2] The ballot title stated: "Governments Must Pay Owners, or Forgo Enforcement, When Certain Land-use Restrictions Reduce Property Value."[3] Voters reading beyond the ballot title to the "Estimate of Financial Impact" discovered that a "Yes" vote came with a huge price tag.[4] Just to pay compensation claims, aside from the administrative costs of this new program, the estimated cost to the State was $18 to $44 million per year, and the cost to local governments was between $46 and $300 million.[5]

However, the financial ramifications of Measure 37 are not the most troubling consequence of its passage.[6] The measure turns Oregon's revered land-use planning system on its head, as well as

* J.D. candidate, University of Oregon School of Law, Class of 2006.

[1] David J. Hunnicutt, *Oregonians in Action Urges a Yes Vote on Measure 37, in* VOTERS' PAMPHLET: VOLUME 1 - STATE MEASURES 110, (2004), *available at* http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf.

[2] *Election 2004: How Oregon Voted*, THE OREGONIAN, Nov. 4, 2004, at D6.

[3] *Measure 37: Ballot Title, in* VOTERS' PAMPHLET, *supra*, note 1, at 103.

[4] *Id*.

[5] *Id.*

[6] On February 21, 2006, the Oregon Supreme Court rejected several arguments that Measure 37 is unconstitutional, reversing the Marion Circuit Court's decision granting the plaintiff's motion for summary judgment on the grounds that Measure 37 is unconstitutional. MacPherson v. Dep't of Admin. Serv., No. 05C10444 (Or. Feb. 21, 2006) *available at* http://www.publications.ojd.state.or.us/S52875.htm. The Oregon Supreme Court held Measure 37 was constitutional and did not violate the "anti-favoritism" clause of the Oregon Constitution, as the plaintiffs argued, by providing some property owners benefits that others cannot get based simply on how long the property owner has possessed the land, thus creating a special class. *Id*. The court also held that Measure 37 does not impair the plenary power of the Oregon Legislative Assembly, does not violate the "suspension of laws" clause of the Ore-

the constitutional doctrines of justiciability, separation of powers, and home rule.[7] How can this statute, engineered to circumvent the land-use planning system, fit in with the existing statutory landscape? Does its deceptively simple approach work within the complex web of judicial, administrative, and legislative processes? How can an allegation that a taking has occurred automatically be transformed into a claim for "just compensation"?

Because Measure 37 is a statutory amendment, the Oregon Legislature may amend it to clarify its ambiguities and incorporate it into existing land-use statutes.[8] The Legislature's task is made even more difficult by a lack of traditional legislative history, as it must look to the nebulous "intent of the voters" for guidance in clarifying these constitutional issues. Despite the Legislature's best attempts, Measure 37's constitutional flaws likely will be fatal to the enacted initiative. This Comment highlights several areas in which Measure 37 is likely to be tested in the months ahead, concluding that the measure violates the constitutional doctrines of justiciability and separation of powers, compels local governments to act illegally, and infringes on local governments' home rule power.

This Comment begins with a brief history of Senate Bill 100 (1973) (S.B. 100), which established Oregon's land-use planning system. Next, Measure 37's predecessor, Measure 7 (2001), is discussed, and Measure 37 is summarized to provide context for the succeeding discussion of "just compensation" and Oregon's land-use planning system. Part II addresses the doctrine of justiciability. Typically, a claimant must exhaust administrative remedies before a claim may be brought to court. However, Measure 37 circumvents this ripeness requirement by granting

gon Constitution, and does not violate the plaintiff's Fourteenth Amendment procedural and substantive due process rights. *Id*.

[7] Only the Oregon Constitution is applicable in this analysis.

[8] Oregon courts generally interpret statutes enacted through the initiative process in the same manner as legislatively enacted statutes. *See* Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 496-98 (1998). Therefore, throughout this Comment, I assume that Measure 37 will be treated as a legislatively enacted statute. *See also* State v. Linn, 131 Or. App. 487, 490, 885 P.2d 721, 722 (1994) ("In construing a statute, there is no essential difference between one passed by voter initiative and one enacted by the legislature."); Portland Gen. Elec. Co. v. Bureau of Labor and Indust., 317 Or. 606, 612 n.4, 859 P.2d 1143, 1147 n.4 (1993) (stating that the same statutory construction applies "not only to statutes enacted by the legislature, but also to the interpretation of laws and constitutional amendments adopted by initiative. . . .").

property owners an automatic cause of action, thus conferring jurisdiction on the courts. Part III explains Measure 37's violation of the doctrine of separation of powers. By allowing local governments to determine the amount of compensation a property owner receives, the measure unconstitutionally assigns localities a strictly judicial function. Part IV focuses on how Measure 37 forces local governments to break state law by granting illegal waivers of state land-use laws. Part V addresses whether Measure 37 infringes on local governments' home rule authority, as the measure is a state statute that unlawfully interferes with the structure of local governments. Finally, the conclusion proposes changes to Measure 37 in the context of the constitutional issues raised in this piece, but argues that any system allowing for waiver of state laws ultimately is unworkable.

I

BACKGROUND OF "JUST COMPENSATION" IN OREGON

A. Senate Bill 100

> Sagebrush subdivisions, coastal condomania and the ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon's status as the environmental model for the nation. We are dismayed that we have not stopped misuse of the land, our most valuable finite resource. . . . The interests of Oregon for today and in the future must be protected from the grasping wastrels of land.[9]

Governor Tom McCall used this vivid imagery in an address to the Oregon Legislature in 1973 to garner votes for S.B. 100, which would establish Oregon's statewide program of land-use planning.[10] Rather than adopting a system in which a state agency administers the entire land-use planning system, Oregon's system gives local governments extensive planning powers.[11] While the State establishes broad planning goals, local governments are responsible for implementing those goals and enforc-

[9] BRENT WALTH, FIRE AT EDEN'S GATE: TOM MCCALL & THE OREGON STORY 356 (1994) (quoting Governor Tom McCall).

[10] *Id.*

[11] *See* Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100,* 77 OR. L. REV. 813, 815 (1998).

ing regulations.[12] The State retains the power to review decisions made by local governments.[13]

"Just compensation," the central plank of Measure 37, was originally included in S.B. 100. Section 24 of S.B. 100 established a Joint Legislative Committee on Land-Use to make recommendations on the "implementation of a program for compensation by the public to owners of lands within this state for the value of any loss of use of such lands resulting directly from the imposition of any zoning, subdivision or other ordinance or regulation regulating or restricting the use of such lands."[14] However, despite section 24's inclusion in the original bill and the Legislature's recognition of the importance of a compensation mechanism in Oregon's land-use planning system, legislators from 1973 to the present have failed to implement a method of compensating property owners.

The reasons for this failure are illustrated by the non-passage of S.B. 849, the "Zoning Compensation Bill."[15] Introduced late in the 1973 legislative session, it would have provided compensation to property owners prohibited from making "reasonable use" of their property or subjected to economic loss because of a government regulation.[16] It authorized several alternatives for state compensation of property owners, including "annual payments, selling to the state a 20% interest in the affected property, [and] having the state guarantee an agreed-upon resale figure."[17]

S.B. 849 was never seriously considered in 1973, and ultimately the legislation died in committee.[18] Part of the reason was the lack of funding available for even the most minimal of S.B. 100's provisions.[19] For example, initially the Ways and Means Committee allotted only $1.00 to the Land Conservation and Development Commission (LCDC) in 1973.[20] Charles Little, in an account of S.B. 100's passage, pointed out the fundamental

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12 *Id.*

13 *Id.* at 815-16.

14 S.B. 100, 57th Or. Legis. Ass'y, § 24 (1973).

15 CHARLES E. LITTLE, THE NEW OREGON TRAIL: AN ACCOUNT OF THE DEVELOPMENT AND PASSAGE OF STATE LAND-USE LEGISLATION IN OREGON 24-25 (1974).

16 *Id.*

17 *Id.* at 25.

18 *Id.* at 24.

19 *Id.* at *25.*

20 *Id.* at 21.

problems of implementing compensation legislation, problems which mirror the arguments of today's Measure 37 opponents:

> First, does the individual landowner have *any* right to compensation, so long as he is not deprived of a reasonable use of his land, never mind his fantasized financial expectations? Second, why should the state give without the opportunity to receive? If some land values are reduced by planning and zoning, there are others (perhaps even more) that are increased. Shouldn't the people of Oregon, if they are to compensate for loss, also be compensated for gain? And third, where in the world would Oregon get the money needed to pay compensation claims?[21]

Little's remarks frame the three arguments against compensation that exist today: lack of justification for compensation, the unbalanced nature of takings, and the lack of funds for compensating property owners.

B. Fate of Measure 7

Prior to the passage of Measure 37, S.B. 100 was challenged by four previous initiatives. Three unsuccessful initiatives—Measure 10 (1976), Measure 10 (1978), and Measure 6 (1982)—preceded Measure 7, which Oregon voters passed in 2000.[22] Measure 7 was drafted by Oregon Taxpayers United (OTU), an organization known for its anti-tax and anti-government initiatives.[23] The media campaign was conducted by Oregonians in Action, a group dedicated to reforming the existing land-use planning system and protecting property rights.[24]

Measure 7 was the clear predecessor of Measure 37.[25] Measure 7 amended the state constitution to require state and local governments to reimburse property owners for loss of value caused by state or local regulations.[26]

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[21] *Id.* at 25.

[22] LEAGUE OF OREGON CITIES, *Measure 7 Declared Invalid by Supreme Court,* http://www.orcities.org/portals/17/A-Z/M7decision.pdf (last visited Feb. 3, 2006).

[23] *Id*.

[24] *Id. See also* OREGONIANS IN ACTION, *Background Information*, http://oia.org/oia2.html (last visited Feb. 3, 2006).

[25] *Measure 37: No: It's a stealth effort to eliminate land-use laws,* THE REGISTER GUARD (Eugene), Oct. 1, 2004, *available at* http://www.takeacloserlookoregon.org/press/r_g3.htm.

[26] *See* Measure 7 (2000), *available at* http://www.sos.state.or.us/elections/nov7 2000/guide/mea/my/m7.htm (last visited Feb. 3, 2006).

However, nearly two years after its passage, on October 4, 2002, the Oregon Supreme Court invalidated Measure 7.[27] The court held that the measure violated the Oregon Constitution's "separate vote" requirement for constitutional amendments referred to voters because it in effect amended two sections of the constitution under the umbrella of one amendment.[28] First, the measure amended Article I, Section 18 by expanding takings liability under the Oregon Constitution.[29] Before the passage of Measure 7, Article I, Section 18 required payment of just compensation only when a property owner demonstrated that he or she had been deprived of "*all* economically viable use of the property" due to a government regulation.[30] Second, the court also found that Measure 7 amended Article I, Section 8 by limiting the right of free expression.[31] Measure 7 allowed governments to refuse "just compensation" to property owners who sell pornography, thus singling out one group of people based on the content of their expression.[32]

Since these two changes to the Oregon Constitution were not substantively related, the amendments should have been presented to voters separately.[33] Measure 7 professed to amend only Article I, Section 18 and not Article I, Section 8; therefore, it was invalidated by the Oregon Supreme Court.[34]

C. Explanation of Measure 37

The proponents of Measure 7, Oregonians in Action, sought to avoid similar constitutional problems by drafting Measure 37 as a statutory amendment.[35] Measure 37 states that property owners are entitled to receive "just compensation" "[i]f 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 amend-

[27] League of Oregon Cities v. Kitzhaber, 334 Or. 645, 56 P.3d 892 (2002).

[28] *Id.* at 649, 56 P.3d at 896. The source of the "separate vote" requirement is Article XVII, Section 1 of the Oregon Constitution.

[29] *Id.* at 667, 56 P.3d at 906.

[30] *Id.* at 667, 56 P.3d at 906 (quoting Boise Cascade Corp. v. Bd. of Forestry, 325 Or. 185, 197-98, 935 P.2d 411, 419 (1997)).

[31] *Id.* at 672, 56 P.3d at 909.

[32] *Id.*

[33] *Id.* at 667, 56 P.3d at 906.

[34] *Id.* at 645, 56 P.3d at 892.

[35] Measure 37 amends Oregon Revised Statutes Chapter 197 "Comprehensive Land Use Planning Coordination." Measure 37 (2004), *available at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

ment that restricts the use of private real property . . . and has the effect of reducing the fair market value of the property."[36] Once the property owner has proven that he or she is entitled to compensation, the government responsible for the regulation can either (1) pay the owner the amount by which his or her property value was reduced, or (2) "modify, change or not apply" the regulation affecting the property.[37]

Although Measure 37 allows local governments to adopt claims processes, these procedures cannot act as an administrative hurdle for the property owner to clear before filing a claim in circuit court:

> [A local government] may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim . . . nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim . . . .[38]

If the regulation remains in force for 180 days after the property owner makes a written demand for compensation, the measure provides a cause of action in the circuit court of the county where the property is located.[39]

II

JUSTICIABILITY[40]

A. Exhaustion of Administrative Remedies

Measure 37 unconstitutionally confers jurisdiction on Oregon circuit courts by providing a cause of action for compensation to property owners, regardless of whether a property owner's claim is justiciable.[41] Generally, Oregon courts require that all admin-

[36] Measure 37 §1 (2004), *available at* http://www.sos.state.or.us/elections/nov2 2004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

[37] *Measure 37 Explanatory Statement, in* VOTERS' PAMPHLET, *supra*, note 2, at 104.

[38] Measure 37 §7 (2004), *available at* http://www.sos.state.or.us/elections/nov2 2004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

[39] Measure 37 §6 (2004), *available at* http://www.sos.state.or.us/election/nov22004/ guide/meas/m37_text.html (last visited Feb. 3, 2006).

[40] For a thorough discussion on justiciability in the Oregon courts, see Utsey v. Coos County, 176 Or. App. 524, 32 P.3d 933 (2001).

[41] Measure 37 §6 (2004), *available at* http://www.sos.state.or.us/elections/nov2 2004/guide/meas/m37_text.html (last visited Feb. 3, 2006). The doctrine of justiciability has its constitutional roots in Article III, Section 1 and Article VII, Section

istrative remedies be exhausted before a claim can be filed in court.[42] However, section 7 of Measure 37 provides that the property owner's failure to utilize a local government's or state agency's claim process shall not "serve as grounds for dismissal, abatement, or delay of a compensation claim."[43] This section plainly seeks to circumvent, for all Measure 37 claims, the judicial requirement of ripeness.[44]

The rationale behind the ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[45] For example, one of the largest Measure 37 claims hails from Hood River County, where a family owning 450 acres of pear orchards wants either the right to build 842 houses on quarter-acre lots or "just compensation" in the form of $57 million.[46] The family does not intend to develop all the land if the regulations on the farmland are waived; rather, it might sell portions of the land for housing and then invest the proceeds into farming the remaining acreage.[47] One land-use consultant predicted that many such claims would never lead to development because land owners often have "high hopes but no development experience or know-how."[48]

In fact, this type of speculative claim is exactly the sort that the ripeness requirement seeks to weed out of land-use adjudication. By requiring at least some adherence to the administrative process to illustrate actual intent to develop, the government can ensure that the property owner has a substantial interest in developing the property.

The ripeness doctrine is essential in regulatory-takings cases, not only to determine which uses local governments permit, but

1 of the Oregon Constitution. *See* Barcik v. Kubiaczyk, 321 Or. 174, 188-89, 895 P.2d 765, 774 (1995).

42 Fifth Ave. Corp. v. Washington County, 282 Or. 591, 614, 581 P.2d 50, 63 (1978) (citing Oregon City v. Hartke, 240 Or. 35, 44, 400 P.2d 255, 260 (1965)).

43 Measure 37 §7 (2004) *available at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

44 *See* Jeffrey G. Condit, *Construing Ballot Measure 37: Clarity and Ambiguity, in* Measure 37 Summit: Analysis of the Measure at 2 (OLI CLE 2005).

45 Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

46 Laura Oppenheimer, *Law Has Fields Ripe for Change: Measure 37 Offers Relief for a Family, Uncertainty for Hood River Pear Country,* THE OREGONIAN, Jan. 6, 2005, at A1.

47 *Id.*

48 Sarah Hunsberger, *Measure 37 Claims Mostly for Homes in Rural Areas,* THE OREGONIAN, Jan. 27, 2005, at A1.

also to determine which regulations affect land values.[49] Under Article I, Section 18 of the Oregon Constitution, a claimant must exhaust administrative remedies before bringing a takings claim to court. As discussed in *Larson v. Multnomah County*, there is no way for a reviewing court to know if a taking has occurred until the parameters of the claim have been reviewed by the appropriate administrative body: "The purpose of the requirement under applicable federal and state constitutions that a 'taking' claim be ripe, is to allow the reviewing body to know 'the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.'"[50]

To establish ripeness, the property owner must first apply in good faith for at least some of the contested uses in the locality, for instance by seeking: "(1) approval for some of the listed, conditionally permitted uses in the underlying zoning district; (2) a variance from the limiting regulations; (3) a comprehensive plan amendment; [or] (4) an exception to the statewide planning goals."[51] This local review allows the government body most familiar with the land, the locality's comprehensive plan, and the proposed development to make an initial decision.[52] Even if the decision is appealed, this process provides a detailed record for use by a reviewing body.[53]

The ripeness requirement also provides an outline of uses that can and cannot apply to the land under applicable regulations, rather than just a vague claim that a "land use regulation"[54] has reduced the claimant's land value.[55] Local governments as well as the Oregon Department of Administrative Services have established claims processes that attempt to identify the specific

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[49] By requiring governments to provide "just compensation" when government regulations reduce property values, Measure 37 provides compensation for some form of regulatory taking, whether or not one has occurred per se under the Oregon Constitution. It is therefore appropriate to apply constitutional requirements for regulatory takings to Measure 37 claims.

[50] 25 Or. LUBA 18, 23 (1993) (quoting Macdonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986)).

[51] LAND USE § 14.36 (Oregon CLE 1994 & Supp. 2000) (citing Suess Builders Co. v. City of Beaverton, 77 Or. App. 440, 445, 714 P.2d 229, 233 (1986) *rev. denied,* 300 Or. 722, 717 P.2d 630 (1986); Larson v. Multnomah County 25 Or. LUBA 18, 23).

[52] LAND USE § 1.30 (Oregon CLE 1994 & Supp. 2000).

[53] Fifth Ave. Corp. v. Washington County, 282 Or. 591, 622, 581 P.2d 50, 67 (1978).

[54] Measure 37 §1 (2004) *available at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

[55] *Larson*, 25 Or. LUBA at 23.

land-use regulations alleged to have adversely affected land values in particular cases.[56]

However, as the measure states, a property owner need not comply with these processes before filing a Measure 37 claim.[57] Thus, in place of an administratively sharpened regulatory-takings claim, a property owner could submit a vague paragraph alleging that a land-use regulation has been "enact[ed] or enforce[d]" against her, and the local government would be forced to waive the regulation, or provide compensation, without any proof that the regulation was actually enforced against the claimant.[58] Maintaining the ripeness requirement would ensure that Oregon courts do not hear such undeveloped cases. Rather, because the local governing body and/or the Land Use Board of Appeals (LUBA) already would have hammered out the claim's details, the circuit court's jurisdiction would be limited to black and white matters of law.

Measure 37 claims essentially are regulatory-takings claims that bypass the legal requirements imposed by Oregon courts in interpreting Article I, Section 18 of the Oregon Constitution. Measure 37 proponents could argue, therefore, that Measure 37 claims are exempt from the constitutional ripeness requirements for regulatory takings (such as exhaustion of administrative remedies). Because Measure 37 has implemented a stricter *statutory* threshold for when "just compensation" is required than the *constitutional* threshold, it could be argued that the constitutional requirements for regulatory-takings claims are not triggered.

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[56] Ryan Frank and Eric Mortenson, *Land-Use Claim Rules Vary by Jurisdiction*, THE OREGONIAN, Dec. 2, 2004, at A1.

[57] For example, the Department of Administrative Services has developed Oregon Administrative Rules 125-145-0010 through 125-145-0120 to handle claims made against the State of Oregon. The "Required Contents of a Complete Claim" necessitates

> citation to each Land Use Regulation on which the Claim is based and evidence or information that demonstrates the following: (a) The manner in which each cited Land Use Regulation restricts the use of the Property, compared with how the owner was permitted to use the Property under Land Use Regulations in effect at the time the owner, or family member, if applicable, acquired the Property; and (b) The amount by which the restriction in use imposed by each cited Land Use Regulation has caused a Reduction in the Fair Market Value of the Property.

OR. ADMIN. R. 125-145-0040(8) (2006).

[58] Measure 37 §1 (2004) *available at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

However, ripeness is required of any claim brought before an Oregon court, even if Measure 37 claims are exempted from the more stringent regulatory-takings ripeness requirements. Requiring ripeness of regulatory-takings claims is not only essential for judicial efficiency, but maintains order in the land-use system. If a property owner has not first navigated established administrative channels to determine if the proposed land use is legal, or if the government regulation will even affect the property, the claim is not ripe and, therefore, not justiciable.

B. Legislative Conferral of Jurisdiction

By allowing property owners to circumvent the administrative process, Measure 37 waives the ripeness requirement and attempts legislatively to confer jurisdiction upon Oregon's circuit courts. The Oregon Court of Appeals recently addressed the issue of legislatively conferred jurisdiction in *Utsey v. Coos County*.[59] There, the League of Women Voters of Coos County (League) sought appeal of a LUBA decision permitting the operation of a "private park" on land zoned for "exclusive farm use."[60] Coos County had approved the operation of an off-highway vehicle trail system and a motocross racetrack on Coos County farmland.[61] The League claimed that the Oregon Legislature had conferred upon it statutory standing through a provision providing that "any party to a proceeding before [LUBA] may seek judicial review of a final order issued in those proceedings."[62] Therefore, the statute conferred standing to a person with no practical interest in the outcome.[63]

The court found that even though the League satisfied the statutory requirement for standing, that alone did not render the League's petition justiciable.[64] The court dismissed the appeal because the League had no concrete interest in the case's outcome, as required by the Oregon Constitution, and thus no standing.[65] The court stated that providing advisory opinions is not a judicial function, so any legislative attempt to empower the courts to do so violated the doctrine of separation of powers:

[59] 176 Or. App. 524, 32 P.3d 933 (2001).
[60] *Id.* at 527, 32 P.3d at 935.
[61] *Id.*
[62] *Id.* at 549, 32 P.3d at 947 (quoting ORS 197.850(1)).
[63] *Id.*
[64] *Id.* at 550-51, 32 P.3d at 948.
[65] *Id*.

"the legislature cannot simply declare that the elements of ripeness, mootness, and adversity have been satisfied."[66]

Like the legislatively conferred standing in *Utsey,* Measure 37 declares that the element of ripeness is automatically satisfied by any claim and thus attempts to confer jurisdiction upon Oregon's circuit courts. This conferral is a violation of the doctrine of separation of powers, as courts may not be statutorily required to disregard established elements of the justiciability of the claim.[67] Since ripeness is constitutionally required for the courts to exercise judicial power, neither the legislature, nor citizens acting through the initiative process, may statutorily alter this requirement.[68] Without the ripeness requirement, the courts potentially could hear claims that have been legitimized, not by their ability to withstand the rigor of the administrative fact-finding process, but because property owners simply declare their adequacy. If there is no justiciable controversy, Oregon's circuit courts cannot constitutionally hear the Measure 37 claim, notwithstanding the measure's clear intent.

III

VIOLATION OF SEPARATION OF POWERS

A. Circumvention of LUBA Review

Measure 37 circumvents the administrative land-use decision-making process, not only by waiving the ripeness requirement, but also by declaring that Measure 37 claims are not "land use decision[s]."[69] LUBA is a central component of the administrative review process and has exclusive jurisdiction over "land use decisions."[70] Thus, by excluding Measure 37 claims from the spectrum of "land use decisions," the measure effectively eliminates LUBA's jurisdiction.

A brief description of LUBA's history and jurisdiction is necessary to understand LUBA's essential role in ensuring the sustainability of Oregon's land-use system and reducing the burden on Oregon's court system. LUBA was created in 1979, several

[66] *Id.* at 560, 32 P.3d at 953.

[67] *Id.* at 548, 32 P.3d at 946-47.

[68] *See id.* at 544, 32 P.3d at 944.

[69] Measure 37 §9 (2004) available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

[70] OR. REV. STAT. § 197.835 (2003).

years after the land-use planning system was established.[71] The Legislature's objective was to create a reviewing body to make timely, final land-use decisions consistent with "sound principles governing judicial review."[72] Prior to LUBA's establishment, the new land-use statutes were subject to inconsistent interpretations by trial courts.[73] LUBA was thus granted exclusive jurisdiction over appeals of "land use decisions"[74] to determine if decisions respecting individual parcels of land conflicted with statewide goals, local comprehensive plans, or land-use regulations.[75] LUBA was created to promote the policies of: (1) expertise; (2) accuracy and consistency; (3) time efficiency; and (4) cost efficiency.[76] Accordingly, the Oregon courts have defined "land-use decision" broadly to maximize LUBA's jurisdiction and maintain its position as the primary adjudicator of land-use decisions.[77]

Since the Oregon Legislature grants jurisdiction to LUBA, it may also limit LUBA's jurisdiction.[78] In fact, there are several land-use statutes that limit LUBA's jurisdiction and specifically grant initial review to Oregon circuit courts.[79] For example, in *Estremado v. Jackson County,* petitioner property owners challenged LUBA's dismissal of their appeal.[80] LUBA reasoned that because the disputed land-use decisions were issued in response to a writ of mandamus, it did not have jurisdiction to hear the appeal.[81] The Oregon Court of Appeals affirmed LUBA's dis-

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[71] LAND USE § 16.1 (Oregon CLE 1994 & Supp. 2000).

[72] *See* OR. REV. STAT. § 197.805 (2003).

[73] LAND USE § 16.1 (Oregon CLE 1994 & Supp. 2000).

[74] OR. REV. STAT. § 197.825 (2003). "Land use decision" is defined in ORS 197.015(10) as

> (A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) The goals; (ii) A comprehensive plan provision; (iii) A land use regulation; or (iv) A new land use regulation; (B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals; or (C) A decision of a county planning commission made under ORS 433.763. (2003).

[75] Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999, 36* WILLAMETTE L. REV. 441, 443 (2000).

[76] *Id.* at 446-47.

[77] *Id.* at 448-49.

[78] LAND USE § 16.33 (Oregon CLE 1994 & Supp. 2000) (citing ORS 215.185, 197.825(3), 215.428(7), and 227.178(7) (2003)).

[79] *Id.*

[80] 146 Or. App. 529, 531, 934 P.2d 515, 516 (1997).

[81] *Id.*

missal, as LUBA's jurisdiction over local land-use decisions in response to writs of mandamus was divested by Oregon Revised Statute (ORS) 197.015(10)(e)(B), which states that "land use decisions" do not include writs of mandamus.[82] LUBA's discretion is also limited by the review of appellate courts,[83] although such review is restricted to LUBA's determinations of law.[84]

Even though the Oregon Legislature, and therefore a voter-approved initiative, has the legal authority to limit LUBA's jurisdiction, there are strong policy reasons favoring LUBA's review of Measure 37 claims. First, Measure 37 claims closely match the statutory definition of a "land use decision," which is "[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) The goals; (ii) A comprehensive plan provision; (iii) A land use regulation; or (iv) A new land use regulation."[85] Moreover, excluding Measure 37 claims from LUBA's jurisdiction is inconsistent with the reason LUBA originally was established—to create consistent initial review of land-use decisions.[86] Although legislators are not bound to conform to the intent of past legislatures, consistency in the application of land-use laws is one of the fundamental premises of the land-use system and should not be discarded without serious deliberation.

Second, it is imperative for judicial efficiency that LUBA's jurisdiction over Measure 37 claims be maintained. LUBA performs a vital role in the adjudicatory process of regulatory-takings claims.[87] Following a local government's final decision

[82] *Id.* at 532-34, 934 P.2d at 517-18.

[83] LAND USE § 16.3 (Oregon CLE 1994 & Supp. 2000).

[84] *See* OR. REV. STAT. § 197.850(8)(2003) ("The court shall not substitute its judgment for that of the board as to any issue of fact.").

[85] OR. REV. STAT. 197.015(10)(A)(2003).

[86] LAND USE § 16.1 (Oregon CLE 1994 & Supp. 2000).

[87] Although I refer to Measure 37 claims as analogous to takings and "just compensation" claims throughout this Comment (because they are essentially the same thing), these claims are *legally* distinct. In the Oregon Attorney General's memo regarding Measure 7 (2000), this distinction is made:

> For three reasons, we believe that Measure 7 effectively eliminates the prior rule that government's exercise of its regulatory powers does not require compensation. First, the text of subsection (a) of Measure 7 expressly requires compensation for regulations that "restrict[ ] the use of private real property." In contrast to the previous language of Article I, Section 18, which was limited to private property that is "taken for public use," Measure 7 is not limited to a "taking" of property, but instead explicitly includes restrictions on use. To the extent a government regulation "restricts the use of private real property," there is no longer any basis in the

on whether a proposed use will be allowed, LUBA reviews any challenge to that decision to determine if a taking has occurred.[88] The circuit court next reviews the decision to determine the amount of compensation, if any, to be awarded.[89]

The Oregon Supreme Court outlined this process in *Dunn v. City of Redmond*.[90] Dunn claimed that a Redmond ordinance preserving his property for future use as a public park was unconstitutional, as the ordinance constituted a taking without just compensation.[91] The issue in the case was whether LUBA had jurisdiction over Dunn's appeal of the local government's decision, since it was a constitutional issue.[92] Although the Oregon Supreme Court found that LUBA lacks jurisdiction over the constitutional issues inherent in a takings analysis, the court reasoned that LUBA should have initial jurisdiction over a property owner's demand (1) for compensation, or (2) that a land-use decision be invalidated:

> But LUBA, rather than a circuit court, has jurisdiction under ORS 197.835(8) . . . to consider issues other than constitutional grounds raised against a land use decision. This is important because constitutional attacks against government policies should await decision of issues of ordinary law; doubtful statutes, ordinances, regulations, or orders should not needlessly be interpreted so as to be unconstitutional when there is another valid and tenable interpretation.[93]

When the property owner is seeking both an invalidation of a land-use decision[94] and compensation, *and* the government defends its decision and denies compensation, the circuit court is not permitted to make a judgment until LUBA reviews the legality of the land-use decision.[95] The court insisted upon LUBA's

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> text of Article I, Section 18, as amended by Measure 7, to exclude that regulation from its purview solely because the regulation is an exercise of government's regulatory powers to prevent harm to the public health, safety or welfare.

49 OR. ATT'Y GEN. OP. 284 at 66-67 (2001).

[88] Dunn v. City of Redmond, 303 Or. 201, 209, 735 P.2d 609, 613-14 (1987).

[89] *Id.*

[90] *Id.*

[91] *Id.* at 203, 735 P.2d at 610.

[92] *Id.* at 204, 735 P.2d at 611.

[93] *Id*. at 206, 735 P.2d at 612.

[94] Although, in the event of a Measure 37 claim, the property owner can circumvent the land-use decision-making process; thus, technically, no "land use decision" would ever take place.

[95] *Dunn*, 303 Or. at 209, 735 P.2d at 614.

initial jurisdiction because LUBA review serves an essential record-making function and legitimizes the takings claim before the court hears the claim: "Allegations of a 'taking' are too easily made in land use cases, however tenuous they may be on the merits, to take cases out of LUBA's 'exclusive jurisdiction.'"[96] LUBA therefore fulfills an essential "filter" function for the courts by "reviewing the facts, framing the issues, and providing reasons for its determination."[97]

B. Assignment of "Just Compensation" Determinations to Localities

Maintaining the current process for the adjudication of regulatory-takings claims, which includes LUBA review, is good public policy, not only because it ensures administrative consistency and serves judicial efficiency, but also because it fulfills the constitutional requirement of separation of powers. Conversely, by allowing local governments, rather than courts, to decide how much to compensate a property owner, Measure 37 violates the separation of powers doctrine.

Determining the appropriate measure of compensation is a strictly judicial function: "It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation."[98] This principle is well established in Oregon case law.[99] For example, in *Wassom v. State Tax Commission,* the State Tax Commission (Commission) attempted to alter the appropriate measure of compensation that Wassom had received in an eminent domain proceeding.[100] The Commission sought to tax the entire lump sum of Wassom's compensation, rather than recognize the judicial definition of "just compensation":

> The constitution guarantees just compensation as defined by the courts. Our court has consistently held that, where a part of a tract is taken, the measure of damages for the taking is the

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[96] *Id.*

[97] Sullivan, *supra*, note 75, at 499.

[98] Monongahela Navigation Co. v. United States, 148 U.S. 312, 317 (1893), *cited in* Chapman v. Hood River, 100 Or. 43, 50, 196 P. 467, 469 (1921).

[99] *See Dunn*, 303 Or. at 204, 735 P.2d at 611; Cereghino v. State Highway Comm'n, 230 Or. 439, 370 P.2d 694 (1962); Tomasek v. Or. Highway Comm'n, 196 Or. 120, 248 P.2d 703 (1952).

[100] 1 Or. Tax 468, 479 (1964).

> actual, cash market value of the land condemned plus the depreciation, if any, in the value of the remaining land not taken.[101]

As in *Wassom,* Measure 37 violates the separation of powers by allowing local governments, rather than the courts, to determine the appropriate measure of just compensation.[102] Proponents could argue that "just compensation," as defined by Measure 37, differs from the judicial definition of just compensation in the context of regulatory takings, and is therefore not subject to this constitutional requirement of separation of powers. However, this distinction is one of semantics. Although Measure 37 does not explicitly refer to government regulations as effecting regulatory takings, it essentially creates an instant cause of action for a taking if there is both a land-use regulation enforced on a claimant's property and a reduction in the value of the property.

Measure 37 cannot compel local governments to act unconstitutionally and violate the separation of powers by usurping the judicial role in determining how much "just compensation" a property owner should receive. Further, the existing judicial process for regulatory takings, including LUBA review, should apply to Measure 37 claims in order to maintain administrative consistency and judicial efficiency.

IV

COMPELLING LOCAL GOVERNMENTS TO ACT ILLEGALLY

When presented with a claim, Measure 37 allows local governments to either (1) "modify, remove, or not apply" regulations, *or* (2) grant compensation to the property owner.[103] Measure 37's compensation option provided voters a false sense that local governments have a choice in how to proceed with Measure 37 claims. Because Measure 37 did not provide a revenue source, and because the existing financial resources of the State and of local governments are so limited, there is little chance that many

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[101] *Id.* at 479-80 (citing State Highway Comm'n v. Burk, 200 Or. 211, 248-9, 265 P.2d 783, 800 (1954)).

[102] Measure 37 §4 (2004), *available at* http://www.sos.state.or.us/elections/nov2 2004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

[103] Measure 37 §8 (2004), *available at* http://www.sos.state.or.us/elections/nov2 2004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

property owners actually will be paid compensation.[104] For example, as of February 1, 2005, eighteen applications had been submitted to Yamhill County requesting more than $30 million in "just compensation."[105] The entire County's annual budget is $80 million.[106] Compensating property owners, therefore, is not a viable option if the County is to continue providing essential services, and local governments such as Yamhill will be forced to resort to illegal waivers of state laws.[107] These waivers force local governments to make land-use decisions that are inconsistent with their comprehensive plans, thus violating state statutes. As an editorial in *The Oregonian* aptly stated: "If state and local governments can't pay, Measure 37 authorizes them to break their own rules."[108]

An overview of the statutory relationship between the State and local governments on land-use matters illustrates how Measure 37 illegally creates a separate process for Measure 37 claims that is inconsistent with the existing statutory and constitutional framework. Senate Bill 100 created the Land Conservation and Development Commission (LCDC) and assigned to it the function of adopting state planning goals.[109] These overarching goals guide localities in establishing comprehensive plans[110] and implementing regulations, which are then reviewed by LCDC to ensure consistency with the goals.[111] Local governments have the freedom to establish the structure of the land-use decision-mak-

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104 1000 FRIENDS OF OREGON, *Why We are Opposed to Waivers of Zoning Protections & No Public Process, available at* http://www.friends.org/issues/M37/ (last visited Feb. 3, 2006).

105 Laura Oppenheimer, *Yamhill County Gingerly Treads on New Ground in Considering Measure 37 Claims,* THE OREGONIAN, Feb. 1, 2005, at A1.

106 *Id.*

107 *Id.* In another account of the Yamhill County hearings, an exchange between commissioners illustrates this trade-off: "Which two deputies in the sheriff's department do you want to let go to pay that $100,000?" Laura Oppenheimer, *Measure 37 Exposes Nerves,* THE OREGONIAN, Feb. 2, 2005, at C1 (quoting Leslie Lewis).

108 Editorial, *Governor Must Respond Quickly,* THE OREGONIAN, Nov. 7, 2004, at F4.

109 LAND USE § 1.5 (Oregon CLE 1994 & Supp. 2000). .

110 A comprehensive plan is a "generalized, coordinated land-use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands . . . ." OR. REV. STAT. § 197.015(5)(2003).

111 LAND USE § 1.7 (Oregon CLE 1994 & Supp. 2000) (citing ORS § 197.225-197.250).

ing process.[112] When any new administrative rule or land-use legislation is adopted, the Department of Land Conservation and Development must notify local governments.[113] The localities must then amend their plans and regulations to comply with these new rules or legislation.[114] Therefore, although the land-use program is run on a statewide level, it is the local governments that are responsible for almost all planning decisions.[115]

Measure 37 requires the government that "enforces" an enacted land-use regulation to compensate the property owner.[116] Since local governments are the primary enforcers of state regulations, it is likely that local governments will be liable for most of the compensation claims under Measure 37, even though they are only enforcing state law.[117]

The Oregon Legislature delegates the authority to implement comprehensive plans to the LCDC, an administrative agency.[118] The constitutionality of this delegation of statutory authority was challenged in *Meyer v. Lord.*[119] The court found that the delegation of legislative power to the LCDC did not violate the Oregon Constitution, as it fulfilled the test for the validity of the delegation: "Whether the practical necessities of the efficient administration of legislative policy requiring the delegation of discretion outweigh the danger or discriminate [sic] action."[120]

A lawful delegation of power is subject to "standards and criteria" to limit the exercise of legislative power by the agency, and in turn, the local governments.[121] Oregon statutes, the planning goals and guidelines, administrative rules, comprehensive plans, and local ordinances represent the "standards and criteria" that make regulation by local governments legal under this bi-level system.[122] It is, therefore, essential to the lawful delegation of

[112] Steven R. Schell, *Overview of Oregon Land Use System: Its History and How it Works, in* MAJOR LAND USE LAWS IN OREGON 19 (National Business Institute ed., 1994).

[113] LAND USE § 1.7 (Oregon CLE 1994 & Supp. 2000).

[114] OR. REV. STAT. § 197.250 (2003).

[115] LAND USE § 1.30 (Oregon CLE 1994 & Supp. 2000).

[116] Measure 37 §1 (2004) *available at* http://www.sos.state.or.us/elections/nov2 2004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

[117] LAND USE § 1.30 (Oregon CLE 1994 & Supp. 2000).

[118] *Id*. at § 10.66.

[119] 37 Or. App. 59, 586 P.2d 367 (1978).

[120] *Id.* at 65, 586 P.2d at 371 (citing Horner's Mkt., Inc. v. Tri-County Metro. Trans. Dist., 256 Or. 124, 132-33, 471 P.2d 798, 802 (1970)).

[121] LAND USE § 10.66 (Oregon CLE 1994 & Supp. 2000).

[122] *Id.* at § 10.70.

power, and the implementation of the land-use system as a whole, that this current balance of powers be maintained.

Measure 37 disrupts the balance of delegated powers between the State and local governments. By allowing local governments to "modify, amend or not apply" land-use regulations—commonly referred to as the power to issue "waivers"—local governments are forced to illegally waive state laws. Under Measure 37, waivers are made by local governments without consideration of the aforementioned standards and criteria. Without such consideration, the foundation of the bi-level system is destroyed, and Measure 37 waivers essentially return the state to "spot zoning," a practice that the land-use system was established to prevent in the first place. Measure 37 will create "[s]pot zoning in its least savory sense"[123] by creating potential "commercial island[s]"[124] in residential areas and golf courses among feed lots.

In the current land-use planning system, the mechanisms most comparable to Measure 37 waivers are "variances." Variances are permits "authorizing use of a particular piece of property in a way that is otherwise prohibited by the local land-use ordinance."[125] The traditional purpose of a variance is to grant relief to property owners when land-use regulations make the land "completely unusable or usable only with extraordinary effort."[126] However, the similarities between Measure 37 waivers and variances end there, as Measure 37 waivers lack the procedural safeguards required of variances—safeguards which help maintain the balance of delegated power between the State and local governments. Indeed, variances must be used sparingly because "a liberal policy of granting improper variances can undermine the goals of the comprehensive plan."[127]

A comparison of Measure 37 waivers to variances illustrates the safeguards that must be added to the Measure 37 decision-making process to prevent violations of state law by local governments. One safeguard imposed on the variance process was outlined by the Oregon Supreme Court in *Fasano v. Washington Co. Comm'rs,* a decision which requires local governments to hold

123 Shaffner v. City of Salem, 201 Or. 45, 53, 268 P.2d 599, 603 (1954).

124 *Id.* at 55, 268 P.2d at 604.

125 LAND USE § 11.2 (Oregon CLE 1994 & Supp. 2000) (quoting ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 20.02, at 365-67 (3d ed. 1986 & Supp. 1992)).

126 *Id.*

127 *Id.*

quasi-judicial proceedings if a variance is sought.[128] In these variance proceedings, the local government must consider established criteria in making its land-use decisions.[129] Typically a property owner must show that, without a variance, it cannot make reasonable use of the property or that some unreasonable hardship justifies the variance.[130] *Fasano* also requires that the parties involved have an opportunity to be heard and to present evidence in certain land-use proceedings.[131] Measure 37 would be greatly improved, and Oregon's land use planning system could be preserved, if these procedural safeguards were added to the measure to prevent violations of state laws.

An Oregon Attorney General memorandum illustrates the conundrum in which Measure 37 places local governments.[132] The memorandum points out that subsection 8 of the initiative "only gives authority to waive a law to the *governing body responsible for enacting the law that gives rise to a claim.*"[133] It also asserts that only the state legislature has the power to waive state law, and a "local governments would not have the authority to waive state statutes or rules that they are required to apply to their decisions."[134] If local governments cannot waive the state laws that guide their decision-making, then they must compensate the property owners.[135] Yet, local governments do not have the resources to pay compensation. Local governments are thus stuck in the middle of the statutory inconsistency created by Measure 37, and have no choice but to grant illegal waivers of state laws.

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128 264 Or. 574, 507 P.2d 23 (1973).

129 *See* Sokol v. City of Lake Oswego, 17 Or. LUBA 429, 434 (1989).

130 LAND USE § 11.20-21 (Oregon CLE 1994 & Supp. 2000).

131 *Fasano*, 264 Or. at 588, 507 P.2d at 30 ("Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.")

132 *See* Memorandum from Richard Whitman, AIC Natural Resources Section, Or. Dep't of Justice to Lane Shetterly, Director, Land Conservation and Dev. Comm'n, and Jim Brown, State Forester, Or. Dep't of Forestry (July 19, 2004), *available at* http://www.orcities.org/portals/17/currentissues/M37/M37DraftAGOpinion.pdf (last visited Feb. 3, 2006).

133 *Id.* at 3.

134 *Id*.

135 *Id.*

V

VIOLATION OF THE DOCTRINE OF HOME RULE

Measure 37's passage raises serious questions regarding the violation of local governments' home rule authority.[136] The measure fundamentally alters the structures and procedures of local governments, infringing upon an area immune from state control. How can voters decide as a state to implement policies compelling local governments to either alter their existing comprehensive plans or pay compensation claims that will significantly detract from other budgetary obligations?

The home rule power refers to a distinct sphere of local authority identified by the Oregon Constitution.[137] There are two objectives fulfilled by home rule.[138] The first is to delegate general state authority to localities, rather than forcing cities to seek explicit delegations of power from the State each time they seek to act.[139] The second objective is to give cities a sphere of authority protected from state interference.[140]

The home rule power of Oregon's local governments is derived from Article XI, Section 2 and Article IV, Section 1(5) of the Oregon Constitution. These provisions allow city and county voters to adopt and amend charters, which in turn authorize local governments to legislate on any matter within their jurisdictional boundaries.[141]

The home rule power is limited by federal and state laws, as well as administrative rules.[142] In Oregon, the home rule power has also been substantially limited by the landmark decision in *City of La Grande v. Public Employees Retirement Board.*[143] There, the court found that if a state law and a local law conflict in an "area of substantive policy, the state law will displace the

136 OR. CONST. art. IV, § 1 (1859, amended 2000) ("The initiative and referendum powers reserved to the people . . . are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district.")

137 GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, LOCAL GOVERNMENT LAW 158-59 (3d ed. 2001).

138 *Id.*

139 *Id.*

140 *Id.*

141 LAND USE § 13.5 (Oregon CLE 1994 & Supp. 2000).

142 *Id.*

143 281 Or. 137, 576 P.2d 1204 (1978).

local rule."[144] Prior to this decision, matters primarily of local concern were immune from state interference.[145] However the court did preserve local governments' power over the *structure* of their government:

> When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.[146]

Home rule plays a complex role in land-use planning. Since the State has delegated to local governments the power to implement comprehensive plans, and the State has the power to pass subsequent legislation modifying those plans, local land-use planning power is already substantially controlled and limited by the State. However, by forcing local governments to establish new administrative processes for Measure 37 claims, the measure's effects reach beyond the administration of comprehensive plans to infringe on the very structure of local agencies.[147]

In addition, given the enormous financial burden compensation claims place on local governments, the measure has the potential to induce large scale structural alterations in local governments; if a local government is suddenly forced to spend half of its annual budget on Measure 37 claims, essential services will have to be eliminated. For example, in Marion County two brothers have submitted a claim demanding the County pay them $150 million in "just compensation" if they are not allowed to build their envisioned casino and golf course in St. Paul, Ore-

144 *Id.* at 149, 576 P.2d at 1211 (citations omitted).

145 *See* State ex rel Heinig v. Milwaukie, 231 Or. 473, 373 P.2d 680 (1962).

146 *City of La Grande* 281 Or. at 156, 576 P.2d at 1215.

147 "Force" is used in a practical, not a legal, sense. Though Measure 37 states local governments "may" establish claims procedures, it would be nearly impossible for local governments to handle the influx of claims without establishing these procedures.

gon.[148] The County faces a dire choice. Either it must waive its regulations prohibiting such development in Oregon's most productive farmland, or it must find a way to pay the brothers' $150 million dollar claim from its $304.5 million annual budget.[149]

Local governments should not be forced to make such changes to their political structures, and should not have to choose between compensating a property owner and providing essential services. Because these areas are immune from state legislation, Measure 37 violates the home rule authority of local governments.

However, there is an equally strong argument that the payment of "just compensation" is a matter of statewide concern that should be legislated on the state level, even at the expense of local governments. The issue of home rule and land-use planning was addressed in *Seida v. Lincoln City.*[150] In that case Lincoln City argued that the courts could not force cities and counties to make land-use decisions because this would infringe on their local government functions.[151] The court held that, because land-use statutes are legislative enactments imposing standards on localities pursuant to substantive regulatory objectives of the State, the statutes are a proper exercise of "state legislative authority and [do] not intrude upon the constitutional home rule authority of cities."[152]

Similarly, proponents of Measure 37 could argue that all Oregon property owners should be protected against unfair land-use regulations and receive "just compensation" for any reduction in their property values. Under such an argument, Measure 37 is furthering a substantive state objective, and is therefore a legitimate subject for state legislation.

Finally, Measure 37 does not literally *require* local governments to establish claims processes, although most have opted to establish them.[153] By using the term "may adopt," the measure's

[148] A constitutional amendment would be required to allow the building of a casino on nontribal lands in Oregon. *See* Ron Soble, *Casino Idea Strains St. Paul's Rural Ties*, THE OREGONIAN, Feb. 13, 2005, at A17.

[149] MARION COUNTY BOARD OF COMMISSIONERS, *Marion County Fiscal Year 2004-2005 Adopted Budget available at* http://commissioners.co.marion.or.us/budget%2004-05/summary.asp (last visited Feb. 3, 2006).

[150] 160 Or. App. 499, 505-06, 982 P.2d 31, 34 (1999) (citations omitted).

[151] *Id*.

[152] *Id*.

[153] Measure 37 §7 (2004) *available at* http://www.sos.state.or.us/elections/nov2 2004/guide/meas/m37_text.html (last visited Feb. 3, 2006).

drafters have provided a possible loophole to thwart arguments that the measure violates local governments' home rule authority.[154] The answer to this constitutional question will largely hinge on how a court faced with the issue defines the sphere of local home rule authority. If an Oregon court were to determine that Measure 37 alters the structures and procedures of local governments, under *La Grande,* it should also hold that the measure infringes upon areas immune from state control.

CONCLUSION

Measure 37 offers property owners protection from land-use regulation beyond what is required in the Oregon Constitution, and even beyond the protection offered anywhere else in the United States. But waiver of land-use regulations cannot be implemented without also implementing the constitutional safeguards that sustain Oregon's statutory land-use scheme. If the 2007 Oregon Legislature does not make Measure 37 claims subject to these constitutional safeguards, or if a substitute initiative is not passed in the next year, Measure 37 claims will burden Oregon courts for years to come. It seems that even the measure's framers anticipated that the courts would be the arbiters of Measure 37 conflicts; the executive director of Oregonians in Action, Dave Hunnicutt, warned local governments "not to charge high fees (applicants will skirt the process), pit neighbors against one another (Oregonians in Action may sue), or outlaw property owners from passing on their new rights when they sell the land (ditto on the lawsuits)."[155]

Measure 37 violates the constitutional doctrines of justiciability and separation of powers, compels local governments to act illegally, and infringes on local governments' home rule power. In the 2005 session of the Oregon Legislature, several bills were introduced to help clarify and implement Measure 37.[156] The most promising legislation was Senate Bill 1037, the product of months of deliberation in the Senate land-use committee.[157] Coming out of the Senate, S.B. 1037 established an application and judicial-

[154] *Id*.

[155] Laura Oppenheimer, *Land Appeals May Face New Rules,* THE OREGONIAN, Nov. 28, 2004, at A1 (quoting Dave Hunnicutt).

[156] *See* S.B. 308, 73d Or. Legis. Ass'y (2005); *see* S.B. 406, 73d Or. Legis. Ass'y (2005); *see* S.B. 1037, 73d Or. Legis. Ass'y (2005).

[157] *See* Laura Oppenheimer, *Mild Measure 37 Bill Passes,* THE OREGONIAN, July 8, 2005, at C1.

review process for Measure 37 claims.[158] However, the House land-use committee did not think the Senate's version adequately protected landowners and scrapped this compromise version.[159] The House's revised version of S.B. 1037 embodied most of the demands of property rights activists, most notably, a provision allowing property owners to transfer their Measure 37 exemptions to future landowners.[160] A compromise between the House and Senate versions of S.B. 1037 could not be reached before the Legislature adjourned, leaving local governments and Oregon courts to iron out the initiative's details. By adjourning without a resolution, the Legislature missed Oregon's best opportunity to remedy the measure's constitutional flaws, flaws that will likely prove fatal to the enacted initiative.

First, section 7 of Measure 37 must be altered to require property owners to submit their claims either through the State or through local government processes. In addition, a final decision by the appropriate government must be a mandatory requirement before a Measure 37 claim can proceed to a circuit court.

The inclusion of section 7, allowing property owners to circumvent governments' claims processes, reflects some property owners' perceptions that governments abuse the ripeness requirement to obstruct even the most legitimate claims. Although this may be one effect of the ripeness requirement, it is nevertheless a constitutionally required element of a justiciable claim, and may not be circumvented by statute.

If the necessary change is not made, not only could the measure be found unconstitutional, but Oregon courts will be burdened by speculative claims lacking in merit. An overburdened claims process frustrates Measure 37's intent to provide a solution for those property owners who truly face severe hardship due to land-use regulations. Additionally, more property owners with legitimate claims will be assisted if section 9, which states that decisions on Measure 37 claims are not "land use decisions," is removed. Since this section effectively removes Measure 37 claims from LUBA's jurisdiction, the court system will be further paralyzed by a litany of meritless Measure 37 claims that could have been filtered out by LUBA review.

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158 *See* Laura Oppenheimer, *Political Notebook: Bill to Revise Measure 37 Passes House Committee,* THE OREGONIAN, July 21, 2005, at D7.

159 *See id.*

160 *See id*.

Second, section 4 of Measure 37 should be amended to clarify that it is not within the power of the State or of local governments to determine the amount of "just compensation" a property owner receives. Unless a court finds that the method for determining compensation under Measure 37 should be distinct from that used for constitutional regulatory takings, allowing any branch of government other than the judiciary to determine the amount of compensation violates the separation of powers.

Third, Measure 37 must provide a revenue source to pay compensation claims on a statewide level. Local governments do not have the ability to pay these claims—nor should they, since they are implementing state law. Also, by providing a statewide funding source, the impact on local governments' structures and procedures would be much reduced, and the violation of local governments' home rule authority thereby substantially diminished.

There are several different forms a statewide compensation scheme could take (aside from drawing compensation payments straight from the coffers of the State's general fund). For instance, "transferable development credits" have been suggested:

> Property owners who are not allowed to build on farmland could be given these credits. They could then sell their credits at a fair market rate to a developer of land newly brought into an urban growth boundary, who could only build by buying enough credits from rural property owners.[161]

Fourth, to ensure that communities are involved in the process, the measure should also be amended to provide procedural safeguards for Measure 37 claims. The safeguards embodied in the variance process should act as a model. That is, a property owner must show at least some level of hardship before a regulation is waived. There must also be a notice requirement to provide an outlet for the concerns of neighboring property owners.

And finally, Measure 37 should provide more guidance regarding the ramifications of waiving state law. As it stands, local governments will be breaking state law by granting waivers. Exceptions allowing for waiver in the event of a Measure 37 claim must be built into each statute in ORS chapter 197. These exceptions, however, will ultimately swallow Oregon's land-use system. 1000 Friends of Oregon Executive Director Bob Stacey's

[161] Bob Stacey, *Land-Use Limbo Fenced In or Fenced Out?,* THE OREGONIAN, Feb. 20, 2005, at F1.

assertion may provide the best solution to this problem: "[T]he measure should be changed to eliminate zoning waivers. None of us should have to fear that one of our neighbors will be allowed to sidestep the laws intended to both limit and protect us."[162]

One piece of legislation considered early in the 2005 session, S.B. 406, offered promising solutions to Measure 37's problems. Senator Kurt Schrader, a Democrat from Canby, Oregon, proposed legislation that would provide prospective, but not retroactive, relief to landowners. The legislation also proposed a funding source for compensation claims: "Everyone has two choices here . . . . We can let courts go ahead and figure out how this is going to be implemented. Or we can have the state Legislature step up and make sense out of a very ambiguous, albeit well-intentioned, ballot measure."[163] If the 2007 Legislature (or a future substitute initiative) can make these fundamental changes to Measure 37, it might be saved from the fate of its predecessor, Measure 7.

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162 *Id.*

163 Laura Oppenheimer and Ashbel S. Gren, *Challenges to Land Law Face Slim Prospects*, THE OREGONIAN, Nov. 12, 2004, at A1 (quoting Kurt Schrader).