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Trading Spaces: Measure 37, *MacPherson v. Department of Administrative Services,* and Transferable Development Rights as a Path Out of Deadlock

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INTRODUCTION

There is an old Chinese curse that goes, “May you live in interesting times.” For observers of land use in Oregon, that curse is a present reality. As the struggle between property-rights advocates and land-use laws heats up around the nation, Oregon finds itself boiling over.¹ For years, people have looked to Oregon for an example of a successful statewide land-use plan. More recently, property-rights advocates from around the nation have looked to Oregon for an example of how to defeat so-called smart-growth and land-use laws. In the past five years, millions of dollars have been spent fighting over property rights in Oregon.² Since 2000, property-rights advocates have succeeded in passing two statewide ballot initiatives, although they have had

¹ Oregon editors and broadcasters voted the Measure 37 controversy as Oregon’s top story for 2005 topping even the methamphetamine crisis. Joseph B. Frazier, Associated Press, *Land Use Ranked as State’s Top Story for 2005*, NEWS-REGISTER (McMinnville, Or.), Dec. 31, 2005, available at http://www.newsregister.com/news/results.cfm?story_no=202535.

² See Follow the Money: The Institute on Money in State Politics, <http://www.followthemoney.org/database/StateGlance/ballot.phtml?si=200437&m=222> (last vis-

mixed success in the courts. Both measures, discussed more thoroughly below, were designed to compensate property owners for partial regulatory takings. The first statute (Measure 7) was held unconstitutional by the Oregon Supreme Court,³ but the court recently upheld the second (Measure 37), overturning a controversial lower-court decision.⁴ A host of outstanding issues ensures that the legal wrangling over Measure 37 will not be over for some time.⁵ Meanwhile, both sides are gearing up with more ballot initiatives for the 2006 election.⁶

ited Mar. 27, 2006) (showing that over \$4.2 million was contributed to Measure 37 campaign committees).

³ *League of OREGON Cities v. State*, 334 Or. 645, 56 P.3d 892 (2002). The basis for the decision was the measure's violation of the *Armatta* principle, a state doctrine forbidding the creation of multiple, closely related constitutional changes by passage of a single measure. *Id.* at 334 Or. at 667, 56 P.3d at 906. This "separate vote" principle was enunciated in *Armatta v. Kitzhaber*, 327 Or. 250, 959 P.2d 49 (1998).

⁴ See *infra* Part II.B (discussing Measure 37 and *MacPherson v. Dep't of Admin. Serv.*, 340 Or. 117 (2006)).

⁵ Laura Oppenheimer, *Court Upholds Measure 37*, OREGONIAN (Portland), Feb. 21, 2006, at A1.

⁶ The land-use battles have spawned a dizzying array of initiatives for the 2006 election season. Property-rights lobbying group Oregonians In Action (OIA) has contributed two Measure 37 revisions (Initiatives 54 and 55) and two other such revisions (Initiatives 63 and 64) that incorporate anti-*Kelo* provisions. See Oregon Sec'y of State, Election Div., <http://www.sos.state.or.us/elections/other.info/irr.htm> (search 2006 Initiative proposals in the "Initiative Referendum and Referral Log") (last visited Apr. 1, 2006); see also *infra* Part I.B for a discussion of the U.S. Supreme Court's decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (upholding a municipality's use of eminent domain to condemn private property for transfer to another private owner in the name of economic development). OIA and Bill Sizemore, Executive Director of the politically conservative Oregon Taxpayers United, have also contributed a handful of solely anti-*Kelo* initiatives (Initiatives 25, 49, and 56-62) with increasingly hostile names, culminating in the "Government Can't Steal My Property and Give it to a Developer Act." See Oregon Sec'y of State, Election Div., *supra*. Anti-Measure 37 initiatives are also in evidence, and these measures most clearly illustrate the strange bedfellows created by Oregon's current land-use climate. 1000 Friends of Oregon, a non-profit charitable organization dedicated to a strong land-use regulatory regime, is supporting Initiative 80, which restricts the ability of governments to issue Measure 37 waivers or compensation remedies, but also grants homestead rights to those who would have been allowed to build a single home at the time of property acquisition. See 1000 Friends of Oregon, Home Owner & Family Farmer's Bill of Rights, <http://www.friends.org/issues/bill-of-rights/index.html> (last visited Mar. 8, 2006). 1000 Friends also supports Initiative 81, which places them with one foot in each camp: anti-Measure 37 and anti-*Kelo*. See *id.* 1000 Friends Legislative Affairs Director Elon Hasson is chief petitioner on three other initiatives: Initiative 140 (supplementing Initiative 81 with a conservation-easement compensation element); Initiative 141 (an anti-*Kelo* initiative allowing compensation for conservation easements) and initiative 142 (providing special tax consideration and easement compensation for conservation easements). Oregon Sec'y of State, Election Div., *supra*.

Observers of the land-use debate may be better served using Oregon as an example of what not to do. For all of the recent efforts in this debate, and for all of the money spent on signature gatherers, advertisements, and legal fees, what have Oregonians received? Mostly, a lot of confusion, disenfranchised voters, public mistrust of the judiciary,⁷ and the appearance that the Oregon Legislature is unable or unwilling to come to a reasonable compromise on issues that matter to Oregonians.⁸ Perhaps it is

⁷ Measure 37 suffers from several drafting and conceptual issues that left officials responsible for administering it unclear about the proper means to do so. The contention over these issues led to several lawsuits, including one by Crook County, which brought suit to determine the legality of its own Measure 37 waiver-remedy implementation. James Sinks, *Counties Find Various Ways to Cope With Measure 37: Officials Say the Mandate Is Unclear*, BEND BULLETIN, Feb. 8, 2005, at C1 (referring to *Crook County v. Crook County*, Civil No. 05-CV0015 (Cir. Ct. Crook County, Or., filed Feb. 3, 2005)).

When a lower Oregon court found Measure 37 unconstitutional, *see infra* Part II.B, the already swampy ground of land-use law in Oregon became a pit of quicksand. The decision “created more confusion around a law that already has perplexed officials, who are unsure of how to enforce it.” Charles Beggs, Associated Press, *Judge Overturns Property Rights Law*, REGISTER-GUARD (Eugene, Or.), Oct. 15, 2005, <http://www.registerguard.com/news/2005/10/15/a1.measure37.1015.p1.php?section=cityregion> (last visited Mar.27, 2006). Voters who had approved of Measure 37 felt that the decision was reflective of a larger problem with judicial activism: “This is telling everybody our vote doesn’t mean squat. We need new judges.” Laura Oppenheimer, *Judge Razes Measure 37 Land Law*, OREGONIAN (Portland), Oct. 15, 2005, at A1. Some even responded to the perception that the decision ignored the will of the voters by issuing a recall petition for Judge Mary Mertens James, discussed *infra*. Neither the bulk of the recall discussion, nor the petition itself, seemed to focus on the basic issue of whether Judge James had followed the law or the Oregon and Federal Constitutions, but instead focused on the fact that Measure 37 was a voter-passed initiative. *See* Petition for the Recall of Judge Mary James, <http://www.recalljudgejames.com/downloads/Petition.pdf> (last visited Mar. 29, 2006). Ironically, the group leading the recall effort calls itself the Constitution Party. In any event, to the shock of many property-rights advocates, the Oregon Supreme Court ultimately came down on their side by overruling Judge James’s decision. Brad Cain, Associated Press, *Supreme Court Upholds Property Rights Law*, SEATTLE TIMES, Feb. 21, 2006, <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=weboregon21&date=20060221&query=supreme+court+upholds+property+rights+law> (last visited Apr.18, 2006).

⁸ The Legislature began its session one month after Measure 37 became effective. Despite efforts on all sides to clarify and correct provisions of the new law, the session ended with no solutions in sight. When asked to hold a special session,

[t]he governor and the state’s top lawmakers all said convening would be unproductive, after months of wrangling over land-use this year disintegrated. Oregon Senate President Peter Courtney, D-Salem . . . said a legislative session was unlikely to get anywhere. A spokesman for House Speaker Karen Minnis, R-Wood Village, said it was hard to imagine lawmakers’ [sic] supporting another round of land-use debate now.

Oppenheimer, *supra* note 7.

the burden of Oregon's informal national leadership in the land-use arena that makes compromise so difficult.

This Article suggests that the parties in the property-rights debate look to the example set in other states and seek reasonable compromise. In short, this Article argues that Transferable Development Rights⁹ (TDRs) may hold an answer for Oregon. TDRs help preserve both property rights and zoning schemes by allowing landowners to transfer development rights from restricted "sending sites" to "receiving sites" better able to accommodate the added density.¹⁰ As such, they offer a solution that would preserve the land-use system that has made the balance between Oregon's urban areas and countryside the envy of the nation, while compensating landowners whose property values may have declined due to those very same land-use laws. However, this compensation, rather than coming from local governments at the expense of other services, would instead be paid by those interested in purchasing TDRs for further development of other properties.

In order to properly address the land-use debate in Oregon, this Article first provides, in Parts I and II, some background on how Oregon has arrived at this point. The remainder of the Article focuses on TDRs: Part III explains how TDR programs work and discusses their advantages. Parts IV and V discuss some challenges that would accompany implementation of a major TDR program in Oregon, both in terms of potential legal pitfalls and possible implementation schemes.

I

REGULATORY TAKINGS, LAND-USE LAW, AND THEIR DISCONTENTS

To some, it may seem that property-rights advocates in Oregon are striking a chord that has been out of tune ever since land-use

⁹ For more background information on transfer development rights, see generally Dorothy J. Glancy, *Preserving Rockefeller Center*, 24 URB. LAW. 423 (1992) (TDRs and architectural preservation); Michael D. Strugar, *Transferable Development Rights: Robbing Peter to Pay Paul?*, 62 U. DET. L. REV. 633 (1985); James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369 (1989).

¹⁰ See Keith Aoki, *All the King's Horses and All the Kings Men: Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro, and Oregon's Measure 37*, 21 J.L. & POL. 397, 442-43 (2005).

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regulations became an accepted part of local government.¹¹ Because property rights in the United States are such a substantial source of contention, it is unsurprising that the relatively rapid, substantial, and continuing changes in legal definitions of property rights over the last century have created upheaval and discontent.¹²

Property-rights advocates make the relatively simple argument that when property is purchased, the owner is entitled to rely on the regulations present at the time of acquisition.¹³ The theory represents a “you get what you pay for” principle that appeals to common sense, and speaks to values that are respected in most fields of law: predictability, fairness, and protection of people’s reliance interests. Furthermore, property-rights advocates make the traditional argument that the Federal Constitution’s takings provision draws a line between regulations that prevent public harm and those that create a public benefit.¹⁴ They argue that regulations preventing public harms fall within the category of laws the State is authorized to pass under its plenary power to govern.¹⁵ By contrast, laws passed to confer a public benefit at the expense of an individual property owner may fall within the “public use” power of eminent domain, and thus require just

¹¹ See generally J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L. Q.* 89 (1995) (presenting several arguments against land-use regulations).

¹² See generally Joan Williams, *The Rhetoric of Property*, 83 *IOWA L. REV.* 277 (1998).

¹³ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 95 (1985) (stating that “All regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state); see also BILL MOSHOFSKY, *REGULATORY OVERKILL: IT’S TIME TO REFORM LAND USE REGULATION: TAKING AWAY THE USE OF PRIVATE LAND TO PROVIDE PUBLIC BENEFITS WITHOUT PAYING FOR IT—THAT’S GRAND LARCENY AND PETTY THEFT* 25-35 (2004) (discussing the importance of individual property rights). See generally Richard A. Epstein, *A Conceptual Approach to Zoning: What’s Wrong With Euclid*, 5 *N.Y.U. ENVTL. L.J.* 277 (1996) (discussing an alternative to zoning and comprehensive plans).

¹⁴ Bill Moshofsky, *The Public Should Weigh Cost vs. Benefit*, *LOOKING FORWARD*, Sept.-Oct. 2005, at 10, available at <http://oia.org/LookingForwardSept-Oct2005.pdf>. For an early judicial opinion expressing this line, see *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928).

¹⁵ Moshofsky, *supra* note 14, at 10; *Cf.*, *Miller*, 276 U.S. at 272 (State destroyed cedar trees to stop the spread of disease to adjoining apple orchards. This was not considered a taking because the State was acting under its police power to prevent harm).

compensation for the property owner under the Federal Constitution.¹⁶

A. *Pennsylvania Coal v. Mahon*

However, there are different and contrary strands of takings jurisprudence that exhibit a similar common-sense appeal. In the landmark case *Pennsylvania Coal v. Mahon*, Justice Oliver Wendell Holmes noted the “long recognized” principle that property rights “are enjoyed under an implied limitation and must yield to the police power” because “[g]overnment hardly could go on” if every diminishment of property values must be compensated.¹⁷ Property owners have no unqualified right to rely on the land-use regulations in effect when they purchased their property, since they buy with presumed knowledge of the changeability of land-use regulations and profit from the reciprocal advantage to their property created by the government’s regulation of others.¹⁸

Holmes went on, however, to acknowledge regulatory takings for the first time, noting that “obviously the implied limitation must have its limits, or the contract and due process clauses are gone.”¹⁹ The Court held that by making it commercially impractical to mine coal (the rights to which previously had been secured by contract) the law had the effect of destroying the property.²⁰ This was a marked departure from the Court’s previous stance that only a physical taking, depriving the owner of possession, could be considered a taking.²¹ Infamously, Justice Holmes left future generations to determine at what point a permissible regulation goes “too far” and thereby becomes a taking.²²

B. *Kelo and the Search for Common Ground*

The search for the “too far” point has created a no man’s land over which property-rights advocates and advocates of land-use

¹⁶ Moshofsky, *supra* note 14, at 10.

¹⁷ *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

¹⁸ *Id.* at 415.

¹⁹ *Id.* at 413.

²⁰ *Id.* at 414.

²¹ *See, e.g.*, *Powell v. Pennsylvania*, 127 U.S. 678, 687 (1888) (regulation not a taking, even though all economic value of the property had been lost); *Mugler v. Kansas* 123 U.S. 623, 668-69 (1887) (regulation prohibiting brewing was not a taking, even though the building in question was a brewery and had little value for any other purpose, and brewing was lawful at the time of purchase).

²² *Pennsylvania Coal*, 260 U.S. at 415.

regulation have battled continuously in the eight decades following *Pennsylvania Coal*. The battle has been fought along two main axes: (1) the extent of deprivation caused by the regulation,²³ and (2) the nature of the public interest served by the regulation.²⁴ Although the Supreme Court continues to address these issues, the major decisions after *Pennsylvania Coal* have

²³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), established a temporary line in the sand regarding the permissible extent of regulatory deprivation, with a bright-line holding that “too far” definitely includes regulations that remove all beneficial economic use of the land. Justice Scalia, writing for the majority in *Lucas*, placed deprivation of all economically viable use of a property among those “categorical” situations (along with physical invasion) that constitute a paradigmatic taking. *Id.* at 1029-30. Justice Scalia then went on to say that deprivations of less than 100% also may be takings, subject to the ad hoc evaluations formulated in the 1978 *Penn Central* decision. *Id.* at 1015 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)). As Justice Scalia acknowledged, no one can say what logic precludes a taking at 95% loss, or 75%, or 50%, *id.* at 1019 n.8, so the line in the sand may move with the future tide of judicial decision or legislative action—including ballot initiatives. *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), perhaps the most famous case to uphold the validity of zoning regulations, allowed a 75% diminution of property value without finding a taking.

²⁴ Early cases attempted to draw the line between regulations aimed at preventing public harm and those aimed at public benefit. See *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (law requiring destruction of cedar trees infected with cedar rust to prevent contamination of apple orchards was justified because the value to the State of the produce outweighed the interests of the cedar owners); *Just v. Marinette County*, 201 N.W. 2d 761 (Wis. 1972) (regulation conferring public benefit is not exercise of police power, but exercise of eminent domain; preservation of land’s rural character upheld as a valid avoidance of public harm). Regulation of property to prevent public harm was considered a legitimate use of plenary power to abate nuisances. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592-593 (1962); *Mugler*, 123 U.S. at 668-69. Regulation to create public benefit, however, was considered a kind of unjust enrichment of the public at the expense of the unfortunate property owner. *Just*, 201 N.W. 2d at 767. These cases exemplify a version of the principle asserted by property-rights groups such as OIA when they argue that regulations for health and safety (e.g., anti-pollution laws) may be permissible without compensation, but regulations granting public “benefits” (e.g., preservation of wildlife habitat) are takings.

Modern land-use cases, such as *Penn Central* and *Lucas*, generally have not embraced this traditional standard, in part because of the obviously subjective nature of attempts to distinguish harm prevention from benefit conferment. As Justice Scalia wrote in *Lucas*,

[T]he distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “takings”—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.

505 U.S. at 1026.

created no principles that definitively end the debate. This uncertainty fuels hostility as each side vigorously defends its own vision of property rights and the public interest, accusing the other side of unprincipled, self-seeking motives.²⁵

The controversy over the Supreme Court's 2005 *Kelo v. City of New London*²⁶ decision illustrates the continuing relevancy of conflicts over the proper type of interest served by government action regarding property. *Kelo* arose when a city used its eminent-domain power to condemn several properties for an economic-development project.²⁷ The project could not be properly characterized as an elimination of public harm because the condemned area was not blighted; instead, it was chosen merely for the practical benefits of using those properties for the project.²⁸ The Court characterized the condemnation as a valid use of eminent domain, reasoning that the taking was accomplished for a public purpose (which it found equivalent to "public use").²⁹ Although the Court did not base its holding on the benefit/harm dichotomy, it dedicated a substantial part of its opinion to showing that the *Kelo* case was indistinguishable from earlier decisions in which blighted areas were condemned on harm-removal grounds.³⁰

Although *Kelo* largely reconfirmed principles enunciated in prior decisions,³¹ a combination of factors in the case (such as

²⁵ For example, during the ascendancy of Measure 37, land-use regulation advocates charged that Measure 37's backers were largely timber and development interests and that campaign exhibits of little old ladies who just want a house on their land were only attempts to conceal the real beneficiaries of the ballot measure. See Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1; see also Election Div., Oregon Sec'y of State, Voters' Pamphlet: Volume 1-State Measures 119-32 (2004) available at <http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf>. At the same time, Measure 37 advocates claim that Judge James, the lower-court judge who found Measure 37 invalid, had her decision made before the case was even presented and ignored the will of the voters. They have filed a petition to recall her from office. Petition for the Recall of Judge Mary James, *supra* note 7. See also Crystal Bolner and Peter Wong, *Recall Targets Judge in Measure 37 Case*, STATESMAN J., Oct. 27, 2005, available at <http://159.54.226.83/apps/pbcs.dll/article?AID=/20051027/STATE/510270368/1042>.

²⁶ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

²⁷ *Id.* at 2658-59.

²⁸ *Id.* at 2660.

²⁹ *Id.* at 2665. The Fifth Amendment prohibits the taking of property for public use without just compensation, and that prohibition is applied to the states through the Fourteenth Amendment. *Id.* at 2658 n.1.

³⁰ *Id.* at 2663-66.

³¹ "Public use" is inclusive of "public purpose." See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-15 (1984). See also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229,

sympathetic middle-class plaintiffs in respectable Victorian homes and the press's strong implication that big business was unfairly profiting off the little guy—or rather, gal) have ignited an op-ed firestorm across the nation.³² Those who in the past had been concerned about the government's ability to condemn private homes for economic improvement are now livid at the thought of their property being condemned for transfer to another private party. Justice O'Connor expressed just such a sentiment in her dissent:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.³³

To guard against *Kelo*-type actions, activist groups across the country have been drafting legislative and initiative measures extending state property-protections beyond the federal protections that the Supreme Court has found in the Federal Constitution.³⁴ The national outrage over *Kelo* has been fueled by continuing uncertainty and confusion over the basic principles

243-244 (1984); *Berman v. Parker*, 348 U.S. 26, 33-35 (1954). Economic development is a public purpose. See *Berman*, 348 U.S. at 33-34 (authorizing exercise of eminent domain where development will serve public goal of preventing urban blight). A taking for the purpose of transfer to a private party is permissible. *Id.*; *Hawaii Hous. Auth.*, 467 U.S. at 243-44 (permitting transfer of condemned property to private parties).

³² Kenneth R. Harney, *Court Ruling Leaves Poor at Greatest Risk*, WASH. POST, July 2, 2005, at F1; Bill Mears, *Supreme Court Backs Municipal Land Grabs*, June 24, 2005, <http://www.cnn.com/2005/LAW/06/24/scotus.property/> (last visited Apr. 2, 2006). The decision generated congressional interest in addition to public controversy: the U.S. Senate Judiciary Committee convened hearings the following September entitled "The Kelo Decision: Investigating Takings of Homes and other Private Property." *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005), available at <http://judiciary.senate.gov/hearing.cfm?id=1612>.

³³ *Kelo*, 125 S. Ct. at 2671.

³⁴ For a catalogue of state legislative efforts, see Wyoming Legislative Serv. Office, *Recent State Legislative Reactions to the U.S. Supreme Court Decision in Kelo v. New London* (2005), <http://legisweb.state.wy.us/PubResearch/2005/05FS021.pdf> (last visited Apr. 1, 2006). Federal efforts include passage in the U.S. House of Representatives of H.R.4128, which would revoke two years of federal economic-development funding from any state or political subdivision that uses its eminent domain power for economic development. H.R. 4128, 109th Cong. § 2(b) (2005). The House also passed House Resolution 340, which expressed disapproval of the *Kelo* decision, specifically the use of eminent domain to "advantage one private party over another." H.R. 340, 109th Cong. (2005).

of regulatory and takings law discussed above. Until land-use jurisprudence provides a principled limit on the government's power to invade property rights, land-use regulations will continue to be viewed with deep suspicion by property-rights advocates as arbitrary and unprincipled burdens.

II

ASCENDANCY OF THE PROPERTY-RIGHTS MOVEMENT IN OREGON: MEASURE 7 AND THE MEASURE 37 PHOENIX

A. *Measure 7 (2000)*

Since the Oregon Legislature passed Senate Bill 100³⁵ in 1973, Oregon has been a leader in land-use planning.³⁶ Oregon's comprehensive planning has helped slow urban sprawl and preserve rural resources.³⁷ In fact, business and civic groups from across the globe tour Oregon's compact cities and pastoral countryside envisioning how they might replicate it "back home."³⁸ More recently, however, Oregon has become known as the leading model for how to defeat land-use regulation.³⁹ With the passage of Measure 37, property-rights advocates from around the coun-

³⁵ S.B. 100, 57th Or. Legis. Ass'y (1973). The bill is codified at Chapter 197 of the Oregon Revised Statutes Comprehensive Land Use Planning Coordination. For a brief overview of the effects of Senate Bill 100, see Aoki, *supra* note 10, at 426-27 and 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, 456-59 (2000).

³⁶ *The Greens Bite Back: Land Wars in the West*, THE ECONOMIST, Oct. 22, 2005, at 35; Dwight H. Merriam, *Breaking Big Boxes: Learning From the Horse Whisperers*, ALI-ABA Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation 2029, 2036 (Aug. 25-27, 2005).

³⁷ Edward S. Sullivan, et al., *The Oregon Example: A Prospect for the Nation*, 14 ENVTL. L. 843 (1984); Editorial, *Oregon's Property Rights Revolt*, CHRISTIAN SCI. MONITOR (Boston), Dec. 6, 2004, at 8.

³⁸ Laura Oppenheimer, *Measure 37 Proclaims: Subdivide and Conquer*, OREGONIAN (Portland), June 12, 2005, at A1; See also Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L. Q. 187 (1997); Sara C. Galvan, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL'Y REV. 587 (2005); George Charles Homsey, *The Land Use Planning Impacts of Moving 'Partial Takings' From Political Theory to Legal Reality*, 37 URB. LAW. 269 (2005); Nancy G. Marguiles, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C. L. REV. 613 (1995).

³⁹ Oppenheimer, *supra* note 37; see also Daniel Brook, *How the West Was Lost*, LEGAL AFFAIRS, Mar.-Apr. 2005, at 44 (describing campaign strategy of Measure 37 advocates).

try have been looking to Oregon for direction in passing compensation statutes in their own states.⁴⁰ As a result, Oregon property-rights activists David Hunnicutt, Bill Moshofsky, and Ross Day have been criss-crossing the country like rock stars,⁴¹ becoming “the Madonnas and Oprahs of property rights.”⁴² Jet-setting across the country and drawing comparisons to pop-culture icons mark a meteoric rise to fame for these “down-home property-rights zealots” that few people had heard of just a few years ago.⁴³

Ever since the 1973 passage of Senate Bill 100, there has been opposition to Oregon’s comprehensive land-use system. However, legitimate challenges to it have been uncommon (albeit notable).⁴⁴ Most believed the system was untouchable. Some even felt that the “vision of protecting farmlands, creating open spaces and planning livable, walkable cities . . . has defined Oregon more than the rain.”⁴⁵

Then there was the 2000 election. While voters focused on anti-tax, anti-teacher, and anti-union initiatives, Oregonians In Action (OIA), a property-rights advocacy group, sponsored Measure 7, which crept in under most people’s radar.⁴⁶ In the early 1990s, OIA was largely dismissed as a minor statewide player.⁴⁷ At the time, OIA had been around for about ten years, primarily representing landowners who had been denied the right to develop their property—most notably and successfully in

⁴⁰ Oppenheimer, *supra* note 37; Charles Delafuente, ‘People’s Law’ Can’t Limit Legislature, Judge Says: Oregon’s Referendum-Created Property Rights Statute Is Overturned, A.B.A. J. E-Report Nov. 4, 2005, at 5.

⁴¹ Oppenheimer, *supra* note 37.

⁴² *Id.*

⁴³ Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 173 (2001); Patty Wentz, *This Land Is Their Land*, WILLAMETTE WEEK (Portland, Or.), Nov. 28, 2000 at 21.

⁴⁴ Perhaps the most famous case is *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Dolan*, the Court required the local government to make some effort to quantify a finding that a dedication for a bike path would ease traffic in proportion to the traffic congestion caused by the plaintiff’s commercial development. *Id.* at 395-96. The Court held that a dedication of property must be roughly proportional to the impact that the government seeks to mitigate. *Id.* at 391.

⁴⁵ Wentz, *supra* note 43.

⁴⁶ *Id.*; Peter Livingston, *Oregon’s Land Use Wars: Measure 7 and Property Rights: Pretty Simple? Pretty Fair?*, OREGON STATE BAR BULLETIN, June 2001, available at <http://www.osbar.org/publications/bulletin/01june/landuse.htm>.

⁴⁷ Wentz, *supra* note 43; more information about OIA is available at the organization’s website, <http://www.oia.org/>.

the *Dolan v. City of Tigard* case.⁴⁸ However, OIA was slowly building influence at the state level.⁴⁹ In 1995, the group supported a regulatory-takings law that was vetoed by the Governor.⁵⁰ In 1998, OIA sponsored and successfully passed Ballot Measure 56, which requires the government to notify landowners if it makes any change that lowers their property values.⁵¹ In 1999, the group helped author and pass thirteen bills, most of which were procedural tweaks in the administration of the Department of Land Conservation and Development.⁵²

Meanwhile, two of Bill Sizemore's⁵³ longtime foot soldiers⁵⁴ were busy drafting Measure 7, which made the signature-gathering rounds with other petitions initiated by Sizemore's Oregon Taxpayers United (OTU), a politically conservative taxpayer advocacy group. Upon hearing about the property-compensation measure, OIA members felt like someone was stepping on their turf and, "after some behind-the-scenes grappling between OTU and OIA, Sizemore handed the measure over once he had collected most of the signatures."⁵⁵ The rest is Oregon land-use history.

⁴⁸ Wentz, *supra* note 43; *see also supra* note 44 (discussing *Dolan v. City of Tigard*).

⁴⁹ Wentz, *supra* note 43.

⁵⁰ *Id.* Senate Bill 600 was a compensation amendment and precursor to Measures 7 and 37. Although it passed the Oregon House and Senate, it was vetoed by Governor John Kitzhaber.

⁵¹ Wentz, *supra* note 43; *see also* BILL BRADBURY, OREGON BLUE BOOK 2005-2006, at 300 (2005).

⁵² WENTZ, *supra* note 43; Dave Hogan, *Land-Use Wins Buoy Oregonians In Action*, OREGONIAN (Portland), Dec. 25, 2000 at A1; Carl Abbott et al., *A Quiet Counterrevolution in Land Use Regulation: The Origins and Impact of Oregon's Measure 7*, 14(3) Hous. AND POL. DEBATE, 383, 396 (2003).

⁵³ Bill Sizemore, a former Bible teacher, gubernatorial candidate and businessman, was the king of direct democracy in Oregon. He led his group, Oregon Taxpayers United (OTU), in placing anti-tax and anti-labor initiatives on the ballot nearly every year. His power stemmed from OTU's ability to get issues on the ballot. However, even when Sizemore's initiatives failed, he fulfilled his objective by distracting unions from pushing their own initiatives. Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1206 (2005). Despite having been convicted of racketeering, Sizemore is still active in Oregon's ballot-initiative process with fifteen proposed measures for the upcoming initiative season. Associated Press, *Lots of Initiative, Not so Many Initiatives*, Jan. 8, 2006 (on file with author).

⁵⁴ Wentz, *supra* note 43. "Measure 7 is the creation of Becky and Stuart Miller, who have been longtime foot soldiers for Bill Sizemore. The two of them penned Measure 7 after an environmental overlay was placed on their land near Fanno Creek." *Id.*

⁵⁵ *Id.*; *see also supra* note 52.

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Measure 7 would have given property owners whose property values had been decreased due to land-use restrictions either a right to compensation for the full amount of decreased value, or a “waiver” of the pertinent regulations by the relevant local government.⁵⁶ Because neither the State, nor most local governments, have surplus funds from which to pay compensation, the measure effectively granted many landowners a virtual individual veto power over any land-use regulations that affected their property values and were passed after they acquired their property. The possible consequences of such a veto power to comprehensive land-use regulation are immense.

When Measure 7 passed in November 2000,⁵⁷ some commentators thought it was “possibly the most important new state measure protecting private property rights.”⁵⁸ Others viewed Measure 7 as the equivalent of “dropping an atomic bomb” on Oregon’s statewide planning system.⁵⁹ Those who have followed the property-rights debate in Oregon know that neither prediction came true. Instead, Measure 7 was ruled unconstitutional by the Oregon Courts.⁶⁰ Ruling unanimously, the Oregon Supreme Court held that, because the measure exempted regulations prohibiting certain activities (such as selling pornography and nude dancing) from its compensation requirement, the measure affected both free-speech and property rights, thus violating the *Armatta* doctrine precluding multiple-subject constitutional amendments.⁶¹

⁵⁶ Measure 7 (2000), available at <http://www.oia.org/m7-text.htm>. The waiver provision of the measure allows the government to “modify, remove, or not apply” the problematic regulations in lieu of compensation. *Id.*

⁵⁷ Measure 7 garnered 53% approval. Election Results: Measures, available at http://www.oregonlive.com/news/oregonian/index.ssf?/special/politics/measure_results2.frame (last visited Mar. 30, 2006); see also Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 ST. LOUIS U. PUB. L. REV. 271, 304 (2002).

⁵⁸ 404 STEVEN J. EAGLE, *THE BIRTH OF THE PROPERTY RIGHTS MOVEMENT* 28 (2001), available at http://www.cato.org/pub_display.php?pub_id=1263.

⁵⁹ James Sinks, *Oregon Voters Put Down Tax Revolt*, BEND BULLETIN (Bend, Or.), Nov. 8, 2000, available at <http://www.bendbulletin.com/apps/pbcs.dll/article?AID=/20001108/VOTE01/11080709&SearchID=73240352612044>.

⁶⁰ League of Oregon Cities v. State, 334 Or. 645, 56 P.3d 892 (2002), discussed *supra* note 3.

⁶¹ 334 Or. at 676, 56 P.3d at 911 (citing *Armatta v. Kitzhaber*, 327 Or. 250, 284-85, 959 P.2d 49, 67-68 (1998)); Peter Wong, *High Court Throws Out Measure On Land Rights*, STATESMAN J. (Salem, Or.), Oct. 5, 2002 at A1; Associated Press, *Oregon High Court Overturns Property Compensation Measure*, OLYMPIAN (Olympia, Wash.), Oct. 5, 2002 at C2.

Following the ruling, both sides issued sound bites. A spokesman for Oregon Governor John Kitzhaber said, “While there’s a need to address the issue of legitimate private property rights versus regulation, [Measure 7] was never the answer. . . . It was a blank check that would have cost Oregonians millions or billions of dollars, while schools and other programs are inadequately funded.”⁶²

Measure 7 proponents were less cordial. OIA co-director and spokesman David Hunnicutt said, “Once again the Supreme Court has spit in the face of Oregon voters. . . . It’s ironic that the reason the court invalidated the measure is because it didn’t go far enough” in providing compensation to “porno store owners.”⁶³ Hunnicutt vowed that OIA would either ask the 2003 Legislature to send voters a revised measure or work to put a new measure on the November 2004 ballot by initiative petition.⁶⁴

By contrast, after the demise of Measure 7, opponents of the initiative appeared to forget about compensation statutes and property rights. Those who thought Measure 7 would not pass were sure any such future measure, robbed of the advantage of flying under the public radar, would surely fail. This unwillingness to address property-rights concerns was rebuked by some:

If we don’t listen to that voice of frustration out there, I think we’re going to lose it all. This is just the first salvo, and if we don’t listen, groups like OIA will be more successful and we could see cracks in Oregon’s land-use law that could become fissures.⁶⁵

B. Measure 37 (2004) and MacPherson v. Department of Administrative Services (2006)

As foreseen by these critics, from the ashes of a court-rejected Measure 7 arose the Measure 37 phoenix, just as OIA’s David Hunnicutt had promised. Measure 37 shares most of the same provisions as Measure 7 but was passed as a statutory enactment instead of a constitutional amendment.⁶⁶ In a *déjà vu* of sorts,

⁶² Associated Press, *supra* note 61.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Wentz, *supra* note 43.

⁶⁶ Compare Measure 7 (2000), available at <http://www.oia.org/m7-text.htm> with Measure 37 (2005), available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html.

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Measure 37 was also challenged in the courts.⁶⁷ On October 14, 2004, Marion County Circuit Judge Mary Mertens James ruled that Measure 37 was unconstitutional under both the U.S. and Oregon Constitutions.⁶⁸ The ruling was broad and sweeping and—had it withstood review by the Oregon Supreme Court⁶⁹—it would have erected formidable legal and practical barriers for property-rights advocates.⁷⁰

The lower-court decision struck down Measure 37 on three primary grounds: First, the measure improperly suspended Oregon laws and abrogated the Oregon Legislature's plenary power to regulate for the public welfare.⁷¹ Second, it irrationally favored a class of citizens in violation of the Oregon Constitution's privileges and immunities clause.⁷² And third, it violated the U.S.

⁶⁷ One major suit was filed by several plaintiffs including 1000 Friends of Oregon, a watchdog group, challenging the constitutionality of the measure on fourteen different state and federal grounds. Before the decision in this suit was overruled by the Oregon Supreme Court, the plaintiffs had prevailed on summary judgment. *MacPherson v. Dep't of Admin. Serv.* Civil No. 05-C10444 (Cir. Ct. Marion County, Or., Oct. 14, 2005), available at http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf, overruled by *MacPherson v. Dep't of Admin. Serv.*, Civil No. S52875 (Or., filed Feb. 21, 2006) available at <http://www.publications.ojd.state.or.us/S52875.htm>.

⁶⁸ See *MacPherson*, Civil No. 05-C10444 (Cir. Ct. Marion County, Or., Oct. 14, 2005), available at http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf.

⁶⁹ See *MacPherson*, Civil No. S52875 (Or., filed Feb. 21, 2006), available at <http://www.publications.ojd.state.or.us/S52875.htm>. (striking down the lower-court decision and upholding measure 37).

⁷⁰ Oppenheimer, *supra* note 7.

⁷¹ *MacPherson*, Civil No. 05-C10444 (Cir. Ct. Marion County, Or., Oct. 14, 2005), available at http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf. The court found that the law forbids the enforcement against some parties of regulations passed for public welfare or requires payment to those private parties for their compliance with the regulations. *Id.* The court noted that government may not pay private parties to comply with validly passed land-use laws because, if this were permissible, the government could be required to reimburse citizens for the costs of complying with any kind of law, "thus rendering the legislative body impotent to regulate for the public good." *Id.*

⁷² *Id.* Article I, Section 20, of the Oregon Constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20. First, the court identified a distinction between two separate classes of citizens, finding that property owners who obtain their land prior to the enactment of land-use regulations (pre-owners) are treated differently under Measure 37 than those who acquire their property after the enactment of land-use regulations (post-owners) because only pre-owners are eligible for claimant status. *MacPherson*, Civil No. 05-C10444 (Cir. Ct. Marion County, Or., Oct. 14, 2005), available at http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf. Applying rational basis review, the court next weighed the legitimacy of the state interest involved. The court held that, because Measure 37's purpose is to compensate property owners for the

Constitution's guarantees of procedural and substantive due process because it (1) lacked protections for neighbors of Measure 37 claimants (who could suffer harm from waivers of land-use regulations), and (2) contained a classification scheme that did not pass "rational basis" review.⁷³ The court also upheld several of the plaintiffs' other claims on secondary grounds.⁷⁴

It seemed impossible that the Measure 37 debate could get more controversial, but Judge James's decision did just that, not only with respect to the legal framing of the issue, but also in terms of the aftermath of the decision. On the day the decision came down, OIA's David Hunnicutt stated, "[t]his is the height of judicial activism."⁷⁵ Hunnicutt is not the only one who felt that way. Since James's decision, "angry Oregonians have rallied to yank her from the bench, have assailed her at parties and have, on at least one occasion, announced that they'd rather shoot her than recall her."⁷⁶ A recall petition filed against James states, "By overruling Measure 37, Judge Mary James has disregarded the express will of the people of Oregon. Judge Mary James has undercut the fundamental, God-given right of Oregonians to truly own their property."⁷⁷ Meanwhile, buoyed

costs of complying with validly enacted regulations (an unconstitutional goal), the purpose does not serve a legitimate state interest. *Id.* The court noted that, even if the measure's purpose were legitimate, its provisions are not rationally related to its purpose because the law's just-compensation calculation yields a windfall for those claimants who actually *benefit* from land-use regulations through their application to surrounding properties. *Id.*

⁷³ *Id.* The court held that, because state law does not provide interested persons who are not claimants a pre-deprivation notice and opportunity to be heard, the measure violates the procedural due-process rights of those parties. *Id.* Although the Oregon Administrative Procedure Act provides that persons affected or aggrieved by a final agency decision are entitled to *judicial* review, this stage of review is "too little, too late" because property owners near or adjacent to a claimant's property likely will have already suffered irreparable harm. *Id.* Once a land-use regulation is not applied pursuant to Measure 37, development begins, and a "serious and imminent risk of an erroneous deprivation of property interests" is created; thus, a post-deprivation hearing cannot be "meaningful." *Id.*

⁷⁴ *Id.* Among the secondary grounds, the court held that Measure 37 (1) accomplished an invalid and unconstitutional suspension of laws, (2) effected an unconstitutional delegation of power to local governments, and (3) violated the substantive due-process rights of neighboring property owners (whose property values would be compromised by waivers of land-use regulations). *Id.*

⁷⁵ Press Release, Oregonians In Action, Marion County Judge Overturns Measure 37 (Oct. 14, 2005), available at <http://oia.org/Measure37overturnPR.htm>.

⁷⁶ Julie Sullivan, *Firestorm over Measure 37 Clouds Judge's Long-Held Dream*, OREGONIAN (Portland), Dec. 4, 2005, at B1.

⁷⁷ *Id.* The Constitution Party of Oregon filed the petition. The drive for signatures is now encountering technical difficulties because some of the signature pages

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by the reversal of James's decision in the Oregon Supreme Court,⁷⁸ OIA is planning further challenges to Oregon's land-use laws at the ballot box in 2006.⁷⁹

Of course, large numbers of Oregonians applauded James's decision as well. Planning advocates called it a "victory for the state's natural landscape."⁸⁰ The land-conservation watchdog group 1000 Friends of Oregon hailed the ruling:⁸¹ "We are very pleased that the court recognized Measure 37 is not about fairness. [The measure] is unfair at its core," said Executive Director Bob Stacey. "We need compensation that makes landowners whole, not waivers that make them rich."⁸² Whether or not that will happen is something only time will tell.

For now, property-rights advocates have prevailed. The Oregon Supreme Court unanimously overruled Judge James's opinion on February 21, 2006.⁸³ Noted one commentator, "The [Oregon Supreme C]ourt utterly demolished the reasoning of the lower-court judge who threw out Measure 37 last fall. Apparently, neither [Measure 37's] nonchalant treatment of neighbors nor its undermining of governmental authority invalidates it from a constitutional standpoint."⁸⁴

Writing for the court, Chief Justice Paul DeMuniz posited that the court's "only function in any case involving a constitutional challenge to an initiative measure is to ensure that the measure does not contravene any pertinent, applicable constitutional provisions."⁸⁵ The court emphatically concluded that no such provision had been contravened, holding that:

- (1) [the] plaintiffs' claims are justiciable;
- (2) Measure 37 does not impede the legislative plenary power;
- (3) Measure 37 does

did not bear the required identification numbers. David Steves, *Recall Petitions for Salem Judge May be Recalled*, REGISTER-GUARD (Eugene, Or.), Jan. 10, 2006, at D1.

⁷⁸ See *MacPherson v. Dep't of Admin. Serv.*, Civil No. S52875 (Or., filed Feb. 21, 2006) available at <http://www.publications.ojd.state.or.us/S52875.htm>.

⁷⁹ Oppenheimer, *supra* note 7. See *supra* note 6 for a listing of current initiatives registered with the Secretary of State.

⁸⁰ Oppenheimer, *supra* note 7.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *MacPherson*, Civil No. S52875 (Or., filed Feb. 21, 2006) available at <http://www.publications.ojd.state.or.us/S52875.htm>.

⁸⁴ Peter Wong, Editorial, *Court Clears the Way for 37 Kinds of Damage*, OREGONIAN (Portland), Feb. 22, 2006, at B6.

⁸⁵ *MacPherson*, Civil No. S52875 (Or., filed Feb. 21, 2006) available at <http://www.publications.ojd.state.or.us/S52875.htm>.

not violate the equal privileges and immunities guarantee of Article I, section 20, of the Oregon Constitution; (4) Measure 37 does not violate the suspension of laws provision contained in Article I, section 22, of the Oregon Constitution; (5) Measure 37 does not violate separation of powers constraints; (6) Measure 37 does not waive impermissibly sovereign immunity; and (7) Measure 37 does not violate the Fourteenth Amendment to the United States Constitution. The trial court's contrary conclusions under the state and federal constitutions were erroneous and must be reversed.⁸⁶

In so holding, the court accorded ample respect to voter mandate and principles of judicial restraint, noting that the constitutionality determination “is the only one that this court is empowered to make” and that “[w]hether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview.”⁸⁷

While property-rights advocates celebrated the decision, and land-use proponents continued to demand legislative action to provide a “fair” solution, neither side is certain as to the future of Measure 37 claims.⁸⁸ The Oregon Supreme Court held Measure 37 to be constitutional, but it did not answer the numerous questions surrounding the law's implementation.⁸⁹ When *MacPherson* was handed down, there were twenty-nine lawsuits with related legal questions “winding their way through the lower courts.”⁹⁰ Following the decision, Governor Kulongoski called upon the state legislature: “Without some action by the Legislature, it may be years before additional court cases begin to clarify all of the uncertainties about the law. In the process, those cases will entail substantial costs and frustrations for state and local governments and private-property owners throughout Oregon.”⁹¹ Additionally, the implementation of Measure 37 may be further complicated as the upcoming November ballot likely will feature initiatives that attempt to limit Measure 37's reach.⁹²

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Peter Wong, *High Court Upholds Measure 37*, STATESMAN J. (Salem, Or.), Feb. 22, 2006 at A1.

⁸⁹ Steve Law, *Measure 37 Legal Interpretations Remain Unresolved*, STATESMAN J. (Salem, Or.) Feb. 22, 2006 at A1; Eric Pryne, *Oregon Property Rights Law Upheld*, SEATTLE TIMES, Feb. 22, 2006 at B1.

⁹⁰ Law, *supra* note 89.

⁹¹ Pryne, *supra* note 89.

⁹² Laura Oppenheimer, *It's Settled: Measure 37 Lives*, OREGONIAN (Portland), Feb. 22, 2006 at A1.

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Thus, for the moment, the property-rights battle “shifts back to local governments, the Oregon Legislature and voters,” meaning the debate likely will drag on for years and may well end up back at the Oregon Supreme Court.⁹³ As one commentator noted, “We’re right back where we started. This was an entertaining, but unproductive, side track.”⁹⁴ But even as the future implementation of Measure 37 remains unclear, this victory for property-rights advocates reverberates across the country.⁹⁵

Beyond Oregon, land-compensation statutes like Measure 37 are springing up across the nation as groups eager to replicate Oregon’s example fly out David Hunnicutt, Ross Day, and Bill Moshofsky to explain how it was done here.⁹⁶ If a property-rights referendum can pass in a “proudly liberal, blue state carried by both John Kerry and Al Gore,” then what is to stop similar measures across the heart of the country?⁹⁷ Additionally, Measure 37 has caused anti-sprawl legislation all over the country to lose political momentum.⁹⁸ The measure “has really excited the property-rights movement and suggests to its supporters that they can challenge smart-growth laws everywhere.”⁹⁹ No doubt, the Oregon Supreme Court’s decision in *MacPherson* will only add to the enthusiasm.

While the property-rights war rages in other states, Oregon gears up for another ballot-initiative season¹⁰⁰ and the “Big Look” at land-use planning authorized by the Oregon Legislature in 2005.¹⁰¹ What will come of it? That is the multi-million (or billion) dollar question. So far, no one seems to have the answer. OIA seems to have the upper hand for now, but are

⁹³ Law, *supra* note 89.

⁹⁴ Oppenheimer, *supra* note 92.

⁹⁵ Pryne, *supra* note 89.

⁹⁶ Oppenheimer *supra* note 38.

⁹⁷ See, e.g., Carol Saviak, *What Florida Can Learn From Oregon About State Land Use Regulation*, Ecologic, May 15, 2005, available at <http://www.eco.freedom.org/el/20050502/saviak.shtml>.

⁹⁸ Harden, *supra* note 24.

⁹⁹ *Id.*

¹⁰⁰ OIA and 1000 Friends are already gearing up for numerous ballot measures in 2006. See *supra* note 6.

¹⁰¹ The 2005 Oregon Legislature passed Senate Bill 82, referred to as the “Big Look,” which created a ten-member task force to evaluate the land-use system and recommend changes for the 2007 and 2009 Legislatures. Press Release, Governor’s Office, State Appoints Oregon Task Force on Land Use Planning (Jan. 26, 2006), http://www.oregon.gov/LCD/docs/30_year_review/land_use_task_force_press_release_012606.pdf.

Oregonians really ready to get rid of the land-use planning system that makes the state so special? Is there not a compromise out there that can provide compensation for some landowners without bankrupting the government while maintaining the core of statewide land-use planning?

Oregonians need the state legislature to take action on this issue¹⁰²—to find a solution that compensates property owners with legitimate claims without “sacrificing our quality of life and hurting neighbors.”¹⁰³ This Article argues that TDRs offer, at the very least, the beginning of a solution.

C. Legitimate Goals of Land-Use Planning: Responding to Discontent

Just as proponents of land-use regulation and environmental protections must concede some meaningful limits on the government’s ability to interfere with the rights of private property owners, so too must property-rights advocates admit that, at some point, unrestricted and unplanned development creates social, economic, and environmental dangers and costs that must be controlled. Development on a parcel of land inevitably creates external impacts on the surrounding lands and the community in general. The most obvious examples of such impacts are environmental: air and watershed damage, erosion, and loss of critical habitat. The less obvious impacts are political and systemic, and often are described by a single term that encompasses a wide and complicated group of phenomena: sprawl.¹⁰⁴

Sprawl is a general term for unrestricted or unplanned development, and volumes have been written describing its negative effects.¹⁰⁵ If local governments are unable (or unwilling) to de-

¹⁰² Telephone Interview with David Hunnicutt, President, Oregonians In Action (Jan. 13, 2006). Hunnicutt blamed the Governor and state legislature’s inaction while noting that the battle over property-rights in Oregon was going to drag on whichever way the Supreme Court came down with *MacPherson*.

¹⁰³ Brad Cain, Associated Press, *Top Oregon Court OKs Property Rights Law That Spawned Washington Initiative*, THE OLYMPIAN, Feb. 21, 2006, (last visited May 24, 2006).

¹⁰⁴ See generally Patrick Gallagher, *The Environmental, Social and Cultural Impacts of Sprawl*, 15 NAT. RESOURCES & ENV’T 219 (2000); James E. Holloway & Donald C. Guy, *Smart Growth and Limits of Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other provisions*, 9 DICK. J. ENVTL. L. & POL’Y 421 (2001); Salkin, *supra* note 56, at 276-307.

¹⁰⁵ See generally William Whyte, *Urban Sprawl*, in THE EXPLODING METROPOLIS 133, 133-50 (Fortune eds. 1958); OLIVER GILLHAM, THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE (2002); MYRON ORFIELD, AMERICAN METRO-

cide where and when development occurs, to limit densities, and to allocate uses, then infrastructure and provision of services will be—to say the very least—inefficient.¹⁰⁶ This imposes extra costs, not only on taxpayers and the character of communities, but also on property owners and developers, who pay at least some of the costs of their unrestricted freedom.¹⁰⁷ Minimizing these externalities through land-use planning and regulation is a necessity, but inevitably engenders resentment and resistance from property owners.

As discussed above, the failure of each side of the land-use debate to address valid criticisms eventually injures both. Comprehensive land-use regulation is in need of some limiting principle beyond the ambiguous constitutional-takings limits that apply when a regulation goes “too far.” In the absence of some clearly articulated judicial or legislative limits, public distrust of the system and outrage over its perceived or real excesses can only grow.¹⁰⁸ However, that fundamental feeling of unfairness is only one negative effect of Oregon’s current land-use regulation paradigm. The uncertainty faced by landowners plays into the hands of land-use speculators. If the use rights an owner possesses today may be taken away tomorrow, a “get what you can, while you can” mentality is inevitable.¹⁰⁹

POLITICS: THE NEW SUBURBAN REALITY (2002); DOLORES HAYDEN, A FIELD GUIDE TO SPRAWL (2004); SUBURBAN SPRAWL: CULTURE, THEORY, AND POLITICS (Matthew J. Lindstrom & Hugh Bartling eds., 2004); ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000).

¹⁰⁶ See JON C. TEAFORD, POST SUBURBIA: GOVERNMENT AND POLITICS IN THE EDGE CITIES 88-160 (1997); JONATHAN BARNETT, THE FRACTURED METROPOLIS: IMPROVING ON THE NEW CITY, RESTORING THE OLD CITY, RIGHTING THE REGION 48 (1995); ORFIELD, *supra* note 105, at 67.

¹⁰⁷ See Anthony Downs, Senior Fellow, The Brookings Inst., Address at the ULI District Counsel Meeting: The Costs of Sprawl Revisited (Apr. 15, 2004), *available at* <http://www.anthonydowns.com/sprawlrevisited.htm>. The statistics in the speech are derived from a study funded by the Transit Cooperative Research Program. TCRP Report 74: Costs of Sprawl-2000, *available at* http://gulliver.trb.org/publications/tcrp/tcrp_rpt_74-a.pdf.

¹⁰⁸ See Homsey, *supra* note 37, at 297-98 (recognizing the difficulty of achieving an equitable solution to takings compensation).

¹⁰⁹ It is this “rush on the resource” phenomenon that forces local governments to institute development moratoria when major changes in zoning regulations are under consideration. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 337-41 (2002). The moment possible changes are announced, land-use speculation skyrockets, marked by a rash of permit applications aimed at vesting development rights before the new (and presumably more restrictive) regulations are in place. See *id.* This phenomenon occurred in Washington State with the

By their very nature, zoning regulations create some barriers to development. Unfortunately, these barriers sometimes stymie not only undesirable development but also desirable development that addresses community needs, such as high-wage employment and low-income housing. To redress this side effect, the system should allow for proactive creation of good development opportunities (however defined), while simultaneously curtailing undesirable development.

Outrage over perceived or real systemic excesses, however, cannot really aid the rights and interests of property owners if it fuels an abrogation of the comprehensive land-use planning system that safeguards the community's welfare in the first place. Now that Measure 37 has been upheld on appeal, there will be some problematic consequences for Oregon. The measure provides no source of funding for compensation or fees, so compensation for even a minority of claims is not a viable alternative.¹¹⁰ Thus, the only practical option available for most local governments is to offer some form of waiver remedy as allowed under the new law.¹¹¹ The goals of comprehensive regulation, such as good planning and efficient services and infrastructure, are subverted if individual owners can choose whether or not to abide by the plans.

Just as significantly, Oregon's local governments, already under immense pressure from both sides, face the prospect of civil litigation for partial-takings damages every time they enact a land-use regulation. Significantly, government entities against whom Measure 37 claims are filed appear to be responsible for paying attorney fees and costs of claimants who actually bring their claims in civil court, even for those claims that eventually

passage of a statewide comprehensive land-use program. See Joseph Elfelt, Editorial, *A Last Hope To Referee The Great Land Rush*, SEATTLE TIMES, May 2, 1991, at A11; Eric Pryne, *Real-Estate Vesting Stampedes Are One Target Of Initiative 547*, SEATTLE TIMES, Oct. 17, 1990, at A1 (noting landowners' efforts to have property rights vested before changed land-use regulation take effect).

¹¹⁰ 1000 Friends of Oregon, *Why We are Opposed to Waivers of Zoning Protections & No Public Process*, <http://www.friends.org/issues/M37/index.html> (last visited Mar. 31, 2006).

¹¹¹ See, e.g., David Bates, *Pair Seek Eye-Popping \$15.6 Million*, NEWS-REGISTER (McMinnville, Or.), Jan. 27, 2005 available at http://www.newsregister.com/news/results.cfm?story_no=189684 (exemplifying Measure 37 claims that exceed realistic budgetary amounts to pay compensation); David Bates, *Ideas Sought for Measure 37 Funding*, NEWS-REGISTER (McMinnville, Or.), Feb. 15, 2005 available at http://www.newsregister.com/news/results.cfm?story_no=190341 (discussing Yamhill County's lack of funding to pay compensation on Measure 37 claims).

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fail.¹¹² The chilling effect of this knowledge on governments considering necessary land-use regulation should not be underestimated. After the passage of Measure 37, several local governments began to consider “blanket waivers” of land-use regulations, by either de jure enactments or de facto administrative waivers for all claimants.¹¹³

Moreover, private landowners themselves are hurt by the uncertainty created by this private veto power over land-use planning. Prior to Measure 37, landowners could expect that land-use regulations for neighboring properties would not change without public proceedings and solid public-welfare justifications (or in the case of a variance, a showing of unusual hardship).¹¹⁴ Even where proposals were made to change regulations or create a variance, neighbors were entitled to produce evidence that a change would be damaging.¹¹⁵ By contrast, when a decision is made about a Measure 37 claim, under the terms of the law, no consideration is due regarding the impact of a zoning change on neighboring properties or the surrounding community.¹¹⁶ As

¹¹² Measure 37 § 6 available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html.

¹¹³ League of Oregon Cities, Measure 37 Advisor, Feb. 11, 2000, page 4. The Oregon Attorney General’s office issued a February 24, 2005 statement that “blanket waivers,” in the form of local ordinances removing land-use restrictions across the jurisdiction before any claims are even made, are not permitted under the measure, and entities must ascertain whether a claim fits within the measure’s requirements before providing any relief—compensation or otherwise. Letter from Hardy Myers, Attorney General, to Lane Shetterly, Director, Oregon Dept. of Land Conservation and Dev. (Feb. 24, 2005) available at <http://governor.oregon.gov/Gov/pdf/m37doj.pdf>. Nevertheless, there is little in the measure to prevent local governments from simply granting waiver after waiver. Some local entities seem to be engaging in this behavior even when they have not ascertained that a given claim meets Measure 37’s requirements for compensation (such as loss of property value caused by a regulation). See David Bates, *County 1st in State to OK Claims*, NEWSREGISTER (McMinnville, Or.), Feb. 3, 2005 available at http://www.newsregister.com/news/results.cfm?story_no=189907 (discussing Yamhill County granting waivers for Measure 37 claims).

¹¹⁴ *E.g.*, *Roseta v. Washington County*, 254 Or. 161, 168, 458 P.2d 405, 409 (1969) (voiding administrative decision because no justification was available for judicial review).

¹¹⁵ *Auckland v. Bd. of County Comm’rs of Multnomah County*, 21 Or. App. 596, 599-603, 536 P.2d 444, 446-47 (1975).

¹¹⁶ The text of Measure 37 does not discuss any notice requirements for neighbors, see generally Measure 37 § 6 available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html. OIA has been foremost in arguing that neighbors do not have a right to participate in the decision-making process, through hearings or other input, of a Measure 37 claim. Don Hamilton, *Nervous Neighbors Start to Gauge Results of Vote*, PORTLAND TRIB., Jan. 25, 2005, available at <http://>

noted in Judge James's decision overturning Measure 37, to the extent that state and local governments do not create procedures to fill this gap, this would seem to be a violation of neighboring landowners' procedural due-process rights.¹¹⁷ The Measure 37 response to the problems in land-use law illustrates the dangers of the pretense that Blackstonian dominion should be the overriding principle of private-property ownership.¹¹⁸

Oregon is deadlocked over the future of land use. Measure 37 and anti-*Kelo* measures address the rights of property owners without acknowledging either the effect of uncontrolled growth or the consequences of limiting local governments' discretion to use eminent domain. On the other hand, adherents to the old land-use regulatory regime cut against voter mandate, seeking to defeat Measure 37 and its kin in the courts without addressing the underlying criticisms of a comprehensive land-use system that has been in place since 1973. There is a dire need for some compromise to resolve the clash of worldviews and perceived interests represented in the struggle over Measure 37. TDRs may point to a way out of this dilemma.

III

TRANSFERABLE DEVELOPMENT RIGHTS (TDR) PROGRAMS: OVERVIEW

The TDR concept can be traced to a 1961 article by Gerald Lloyd, *Transferable Density in Connection with Density Zoning, New Approaches to Residential Development*.¹¹⁹ At the time, a

www.portlandtribune.com/archview.cgi?id=28015. Despite Measure 37's failure to provide for administrative rights of neighbors, however, the State and local governments have statutory and common-law obligations that include certain procedural requirements for changes in land-use regulations, sometimes including hearings.

¹¹⁷ See *MacPherson v. Dep't of Admin. Serv.* Civil No. 05-C10444 (Cir. Ct. Marion County, Or., Oct. 14, 2005), available at http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf. In overruling James's decision, the Oregon Supreme Court held that Measure 37 could not be found invalid merely because it did not provide for these specific procedural protections, since the measure did not preclude the State or local entities from using such procedures in their decision-making processes. See *MacPherson v. Dep't of Admin. Serv.*, Civil No. S52875 (Or., filed Feb. 21, 2006) available at <http://www.publications.ojd.state.or.us/S52875.htm>.

¹¹⁸ See generally Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000) (discussing the property rights movement and the role of the state).

¹¹⁹ Gerald Lloyd, *Transferable Density in Connection with Density Zoning, New Approaches to Residential Development*, URBAN LAND INST. TECHNICAL BULL. 136 app. G (Jan. 1961). See also WILLIAM FULTON ET AL., TDRS AND OTHER MARKET-

practice referred to as “clustering” allowed developers to transfer development rights that were restricted in one part of a development (the “sending site”) onto another area in the same development (the “receiving site”).¹²⁰ Lloyd’s article suggested development credits also should be available for adjacent receiving sites not owned by the original developer.¹²¹ In 1972 John Costonis published an article advocating even further expansion of this idea by dropping the adjacency requirement entirely.¹²² Under Costonis’ “Chicago Plan,” no new density would be created, so the overall density of the area would remain stable.¹²³

More than 130 local governments and twenty-two states have adopted some form of TDR program.¹²⁴ TDR programs in their current form require designation of sending sites eligible for severable development rights.¹²⁵ The sending-site element of a TDR program can be either zoning-based or voluntary. In the zoning-based form, regulations are created for the sending-site zones through the normal zoning process, and TDRs are offered to owners as a form of mitigation or compensation for the restric-

BASED LAND MECHANISMS: HOW THEY WORK AND THEIR ROLE IN SHAPING METROPOLITAN GROWTH 7-8 (2004), *available at* http://www.brookings.edu/urban/pubs/20040629_fulton.pdf (describing how a TDR system operates).

¹²⁰ RICK PRUETZ, *BEYOND TAKINGS AND GIVINGS* 34 (2003). New York City’s 1961 zoning resolution was one example of a more relaxed “clustering” approach. *See* Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 *BROOK L. REV.* 867, 873-75 (1984) (discussing the 1961 zoning resolution). The program allowed density to be transferred from one parcel to another contiguous parcel owned by the same party. In 1968, the clustering protocol was loosened by a new amendment allowing sale of development rights to new parties for use on contiguous or adjacent properties. PRUETZ, *supra* at 34; *see also* William Neuman, *Selling the Air Above*, *N.Y. TIMES* Mar. 5, 2006, § 11 at 1. (discussing the history of New York City’s TDR program in the context of the current boom in buying and selling airspace rights). For more information on air space transfer rights, *see generally* N.Y. City Planning Commission Res. C 980682 ZSM (Jan. 6, 1999); Martin Gottlieb, *Zoning Fight Again Imperils Grand Central*, *N.Y. TIMES*, Oct. 14, 1986, at B1; David Dunlap, *Builders Lose Bid to Transfer Air Rights*, *N.Y. TIMES*, Aug. 24, 1989, at B1; Steven D. Kowaloff, *Grand Central Zoning Game: Project Symbolized Contest Between City and Developer*, *N.Y. L. J.*, Sept. 20, 1989, at 33; Harry Berkowitz, *City Backs Air Rights Transfer*, *NEWSDAY*, Nov. 4, 1989, at 6.

¹²¹ Lloyd, *supra* note 119, app. G, at 136-37.

¹²² John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 *HARV. L. REV.* 574, 594 (1972).

¹²³ *Id.*

¹²⁴ State Environmental Resource Center, *Transfer of Development Rights*, <http://www.serconline.org/tdr/background.html> (last visited Mar. 31, 2006).

¹²⁵ PRUETZ, *supra* note 120, at 29-30.

tions.¹²⁶ In return for a TDR, the landowner accepts a negative covenant on the land that at least semi-permanently restricts development to that contemplated by the regulations.¹²⁷ In the voluntary form, a baseline capacity for development is set, and property owners are eligible for TDRs if they waive a portion of that development capacity by creating a negative covenant.¹²⁸

The TDRs issued to sending-site owners are fungible, and may be purchased and used by qualifying developers on receiving sites.¹²⁹ Receiving-site developers have the choice of developing at the present baseline zoning, or purchasing TDRs to develop past that baseline capacity.¹³⁰

A. *Benefits of TDR Programs*

TDR programs allow coordination of efforts to manage preservation and control development patterns.¹³¹ At the same time, the programs assess regulatory impacts on property owners and effectively mitigate the diminution in property values that might result from regulatory restrictions on use of their land.¹³² Moreover, most TDR programs allow localized flexibility in their goals, methods, and procedures.¹³³

TDR programs address the concerns of property-rights advocates (1) by providing real assessment of the financial impacts of contemplated land-use goals on property owners, and (2) by responding to those impacts with access to mitigating rights in the form of transferable development credits.¹³⁴ If good land-use

¹²⁶ *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 749-50 (1997) (Scalia, J., concurring); *see generally Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *see generally infra* Part IV.A.

¹²⁷ The negative easement is permanent, but can be made temporary by provisions in the easement language allowing the sending site to be converted to a receiving site at the option of the TDR program administrators. PRUETZ, *supra* note 120, at 76. The owner of the property at that time would, of course, need to purchase TDRs to regain the development rights that had previously been removed from the property. *Id.*

¹²⁸ *Id.* at 30.

¹²⁹ *Id.* at 30-31.

¹³⁰ *Id.*

¹³¹ *Id.* at 36-43.

¹³² Julian Conrad Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 444-447 (1998); *see also* Franklin G. Lee, *Transferable Development Rights and the Deprivation of All Beneficial Use: Can TDRs Salvage Regulations That Would Otherwise Constitute A Taking?*, 34 IDAHO L. REV. 679, 707 (1998).

¹³³ *See generally* PRUETZ, *supra* note 120, at 75-79.

¹³⁴ Juergensmeyer, Nicholas & Leebrick, *supra* note 132, at 444-447.

planning requires use restrictions on a certain group of properties, those properties can be designated as sending sites.¹³⁵ If the restricted owners take advantage of the TDR program, the loss of potential use of their land will be mitigated by their receipt of tradable credits, or TDRs.¹³⁶ A successful TDR program requires careful advance assessment of any contemplated regulations, including (1) the financial impact on regulated properties, (2) the impact on the value of development rights that must be transferred to be used, and (3) the impact of making those development rights available for sale on the TDR market.¹³⁷

TDR programs address land-use regulation goals at two points: sending-site application and receiving-site application.¹³⁸ Once a program is established, new categories of sending and receiving sites can be created in response to newly arising regulatory needs.¹³⁹

B. *Sending-Site Applications*

TDR program goals are also implemented by selecting sending-site categories responsive to a community's land-use needs. For instance, if the local community has experienced typical sprawling growth without thought to preservation of dwindling farmlands, a TDR program might include agricultural land of a certain quality as one category of sending site.¹⁴⁰ If gentrification in the area has created an affordable-housing shortage, the program might designate existing low-income housing as eligible for sending-site status.¹⁴¹ In this way, *any* resource can be preserved through sending-site designations: recreational areas, forest land, sensitive environmental zones, historic landmarks, etc.—once

¹³⁵ PRUETZ, *supra* note 120, at 29-30.

¹³⁶ *Id.* at 30-31.

¹³⁷ *See id.* at 57-60.

¹³⁸ *Id.* at 29-31.

¹³⁹ *See id.* at 197 (discussing how Los Angeles originally created a program as a general method of channeling density growth toward areas in which the growth was welcomed, and away from areas it was not. Ten years later, the city adopted a program to preserve historical buildings within development sites).

¹⁴⁰ Maryland leads the nation in preservation of agricultural land through TDR programs. *See id.* at 211. Calvert and Montgomery counties have preserved almost 50,000 acres of farmland. *Id.* at 176, 211.

¹⁴¹ Seattle, Washington has implemented a TDR program over the last twenty years with the goal of improving availability and retention of affordable housing. *Id.* at 233-36. Importantly, one of the requirements for sending-site qualification is compliance with housing and building codes. *Id.* at 233.

sending sites are designated, the TDR mechanism operates to shift development pressures away from those areas.

Alternatively, a community may use sending-site designations to shape growth in a more general way, by creating sending zones in areas designated for limited growth. This kind of “shaping” sending zone can be used to prevent sprawl, ensure the efficiency of infrastructure investment, and redirect growth to areas designated for new development or urban renewal.¹⁴²

C. Receiving-Site Applications

Program goals may also be implemented by selecting receiving-site categories. As noted above, TDR programs, by restricting sending-site applications, make growth more desirable in areas *not* reserved for sending sites. This desirability can be enhanced by drawing receiving-site categories to encompass desirable growth areas. As with the sending-site categories discussed above, receiving-site categories may be crafted according to general “shaping” principles or may be designated topically.¹⁴³ Thus, receiving-site categories can be drawn to support either general planning goals or more targeted projects such as creating affordable housing or needed medical facilities, reinvesting in blighted neighborhoods, or increasing density and mixed-use functionality.¹⁴⁴

D. The Role of TDR Banks

TDR banks, sometimes called “development banks,” serve many useful functions within a TDR program. First, a TDR

¹⁴² Cupertino, California has implemented such a program, designed to prevent unmanageable growth of traffic. *Id.* at 179-80. The program differs from typical density-transfer programs because it is based at least partially on trip-generation rates. *Id.* at 180. Instead of trading density, sending sites and receiving sites trade trip-generation capacity. *Id.*

¹⁴³ For example, when New York desired to create redevelopment in the South Street Seaport district while preserving the historical integrity of the area, it designated a Historic District that included both sending (historic) sites and receiving (redevelopment) sites. Because of the combination of historic-preservation and redevelopment initiatives, the once endangered area is now a tourist destination. Sarah J. Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1345-47 (1998).

¹⁴⁴ Traverse City, Michigan, for example, has implemented a program to create a desired medical facility by redeveloping the grounds of an old hospital campus from the 1800s. The program allows transfer of development capacity from one part of the site to others, upon the condition that natural and historical areas of the site are preserved. PRUETZ, *supra* note 120, at 442-43.

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bank may act as a sort of holding facility for sending-site TDRs.¹⁴⁵ This holding function is important for several reasons. First, a sending-site owner may use TDRs as collateral for loans.¹⁴⁶ The TDR bank serves as a natural escrow account, and can verify the value and marketability of the TDRs.¹⁴⁷ In the event of default, the bank can serve as a guarantor on the loans, and will simply take ownership of the TDRs and sell them to a receiving-site owner.¹⁴⁸ Second, the holding function removes many transaction costs for buyers and sellers, who would otherwise experience supply and demand time-lags.¹⁴⁹ Third, receiving-site owners further benefit because TDR banks make possible consolidated purchases of TDRs from multiple sending sites.¹⁵⁰

TDR banks also provide a stabilizing function. As established institutions, the banks can help educate the public through outreach programs for real-estate professionals and land-use lawyers, who in turn can inform their clients of the new options created by TDR programs.¹⁵¹ Moreover, as noted above, TDR banks reduce transaction costs for buyers and sellers through predictable and standardized procedures, recordkeeping for TDR transactions and easements, and streamlined appraisal and valuation processes.¹⁵² Owners of TDRs who do not wish to hold them for collateralization may sell them directly to the bank.¹⁵³ The bank can therefore be utilized to provide minimum-price guarantees for TDRs, encouraging the success of the TDR program and ensuring that TDRs offered as compensation for regulatory takings have actual value.¹⁵⁴

Finally, TDR banks can be used as a repository of funds for outright government purchases of easements and dedications.¹⁵⁵ One of the purposes of a TDR program is to avoid the necessity

¹⁴⁵ Stevenson, *supra* note 143, at 1341-44. See also PRUETZ, *supra* note 120, at 160-61.

¹⁴⁶ Stevenson, *supra* note 143, at 1349.

¹⁴⁷ *Id.* at 1341-43, 1349; see also PRUETZ, *supra* note 120, at 160-61.

¹⁴⁸ Stevenson, *supra* note 143, at 1349.

¹⁴⁹ *Id.* 1341-43; see also PRUETZ, *supra* note 120, at 160.

¹⁵⁰ Stevenson, *supra* note 143, at 1343.

¹⁵¹ PRUETZ, *supra* note 120, at 161.

¹⁵² Stevenson, *supra* note 143, at 1342-44. See also PRUETZ, *supra* note 120, at 161.

¹⁵³ PRUETZ, *supra* note 120, at 160.

¹⁵⁴ *Id.*

¹⁵⁵ See *Id.*

of outright takings, but in those instances in which TDR solutions are not appropriate, eminent domain actions may be necessary.¹⁵⁶ For example, eminent domain may be necessary when a sending-site owner has opted not to participate in a voluntary TDR program, but the local government nevertheless decides to secure the land for preservation. Accordingly, TDR banks in several programs have been empowered to act under eminent domain.¹⁵⁷ As another important practical advantage, those lands that are purchased outright for preservation will retain development rights that then can be severed from the property and sold to recover part of the acquisition costs.¹⁵⁸

E. Advantages for Sending-Site Owners

Sending-site owners gain several benefits from TDR programs. First, and most obvious, sending-site owners who did not intend to develop their property anyway reap the monetary benefits of receiving a tradable and potentially valuable commodity. However, the value of this benefit depends heavily on the market, and sending-site owners under voluntary programs may decide that actual development of their land benefits them more than sale of their TDRs. Thus, some TDR programs offer participants additional development bonuses; for example, a sending-site owner who would receive the equivalent of only one TDR by developing her own land might, by participating in the program, become eligible for four or five TDRs, and therefore a larger and much more certain return on her investment.¹⁵⁹

Participation in TDR programs may also qualify landowners for federal, state, or local tax deductions for conservation ease-

¹⁵⁶ Important compensation issues arise when comparing compensation for an eminent-domain condemnation to compensation for TDRs. As mentioned in the *Penn Central* decision, it is the value of *reasonable* "investment-backed expectations" that is being lost, not speculative value. *Penn Cent. Transp. Co. v. City of New York*, 438 US 104, 127 (1978) (emphasis added). A TDR program will need to establish its own measurements for compensation that comport with takings law and the goals of the program, both for the purchase of development rights under the program, and for outright purchase of property.

¹⁵⁷ For example, Malibu Coastal Program's Coastal Conservancy, and San Luis Obispo County's Land Conservancy.

¹⁵⁸ PRUETZ, *supra* note 120, at 159.

¹⁵⁹ William Fulton et al., Brookings Institute Center on Urban and Metropolitan Policy, TDRs and Other Market-Based Land Mechanisms: How They Work and Their Role in Shaping Metropolitan Growth 8 (2004), http://www.brookings.edu/urban/pubs/20040629_fulton.pdf.

ments or similar programs.¹⁶⁰ Moreover, where the negative covenants imposed by TDR programs reduce property values, landowners may benefit from lower property taxes.¹⁶¹ Finally, and perhaps most importantly for many property owners, unsold TDRs can be used as security for loans.¹⁶² Thus, owners who are not interested in fully developing presently held parcels can leverage their TDRs to fund, for example, the purchase of more land.

F. Advantages for Receiving-Site Owners

TDR programs allow participating receiving-site owners to leverage funds spent on TDRs to achieve further benefits. For example, they too may be eligible for city, county, or state tax deductions, abatement programs, and other incentives.¹⁶³

But for developers, the real value of many TDR programs may be the increased government emphasis on finding suitable sites for growth and development, and on fostering the use of them.¹⁶⁴ A successful TDR program requires local governments to facilitate desirable development as a tradeoff for the restrictions on undesirable development. This benefit is especially important in Oregon, where urban growth boundaries, as presently conceived, have limited the availability of developable sites to "urban" or "urbanizable" areas.¹⁶⁵

IV

LEGAL CONCERNS REGARDING TDRS

There are three aspects of TDR programs that must be considered carefully to avoid legal and strategic problems: the baseline regulations on both sending and receiving sites, the TDRs themselves, and the negative covenants. This section explores poten-

¹⁶⁰ Stevenson, *supra* note 143, at 1340.

¹⁶¹ *Id.* at 1341. This loss of tax revenue may be recovered through the increased value of receiving sites. *Id.*

¹⁶² *Id.* at 1349.

¹⁶³ Stevenson, *supra* note 143, at 1340.

¹⁶⁴ For example, the New Jersey Pinelands program caused the government to undergo an extensive analysis to identify areas suitable for development. *Id.* at 1356-1357.

¹⁶⁵ Robert H. Freilich, *Smart Growth in Western Metro Areas*, 43 NAT. RESOURCES J. 687, 693 (2003); Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L. Q. 401, 482 (1987).

tial problems with respect to these aspects, first in terms of sending sites, then receiving sites, and finally by looking at miscellaneous legal and structural issues.

A. *Sending-Site Challenges: Effect of TDRs on Takings Analysis*

As discussed above, some TDR programs, such as Seattle's,¹⁶⁶ are completely voluntary on the sending-site side. In those programs, sending-site owners, in return for TDRs, may choose to create a negative covenant binding their property to extra land-use restrictions. Such programs clearly are not vulnerable to takings challenges because of their voluntary nature.

Other programs simply impose restrictions that conform to program goals, and TDRs are offered to mitigate the impact of the program on the affected property owners. In this latter type of program, if the result of the regulation is to deprive the property of all beneficial economic use, it may be challengeable as a *Lucas*-style regulatory taking.¹⁶⁷

Considerable debate remains regarding the effect that a grant of TDRs has on the takings status of regulatory restrictions applied to a sending site. It is possible that, in non-voluntary, zoning-based programs, both the regulatory restrictions placed on the sending site and the negative covenant required as a condition of receiving TDRs create a taking if they deny all economically beneficial use of the land under *Lucas*,¹⁶⁸ or if they amount to a taking under the evaluation set forth in *Penn Central Transportation Corp. v. City of New York*.¹⁶⁹

The first Supreme Court decision to address this issue, *Penn Central*, did so indirectly, and seemed to classify TDRs as residual value left in the property after land-use regulations are applied.¹⁷⁰ However, at least one recent Supreme Court opinion

¹⁶⁶ PRUETZ, *supra* note 120, at 233-36.

¹⁶⁷ See *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1016 (1992) (re-stating the notion that “[a] statute regulating the uses that can be made of property effects a taking if it ‘denies an owner economically viable use of his land’”) (Emphasis in original).

¹⁶⁸ See *id.*

¹⁶⁹ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978). *Penn Central* indicated that general loss of opportunity would not be considered a taking, only loss of existing profitable use or interference with “distinct investment-backed expectations.” *Id.*

¹⁷⁰ *Id.* at 137. Justice Rehnquist’s dissent, joined by Justice Stevens, argued that a taking had occurred, counted TDRs on the compensation side, and would have re-

suggests that a future decision could legally categorize TDRs on the side of just compensation, rather than residual value (i.e., TDRs would be considered compensation for lost property value, not retained value left over after land-use regulations are applied).

In the 1997 *Suitum v. Tahoe Regional Planning Agency* decision, Justice Scalia authored a partial concurrence urging that if a government easement leaves no economic use, a taking has occurred, regardless of TDR availability.¹⁷¹ When TDRs are given, Scalia opined, they cannot serve as residual value somehow neutralizing the regulation's effect.¹⁷² Rather, TDRs should be evaluated on the "compensation side of the takings analysis" because their classification as residual value essentially would allow government to provide only partial compensation for a full taking.¹⁷³ In other words, governments could avoid ever fully compensating landowners for regulatory takings simply by issuing TDRs and claiming that, since the property retains *some* value, no taking has occurred.¹⁷⁴ For this reason, Scalia argued that TDRs should serve as partial or full compensation for a taking, depending on the amount of the taking and the value of the TDRs created.¹⁷⁵

Because the Court has not yet clearly designated TDRs as either compensation or residual value, implementation of TDR programs must include clarification on this point. Based on the

manded to the lower court for determination of whether that compensation was a full measure of the taking. *Id.* at 150-52.

¹⁷¹ 520 U.S. 725, 747 (1997). In *Suitum*, the Court ruled only on the ripeness of the takings complaint, and expressly refused to rule on the role of the TDRs attached to the property (which was ineligible for development). *Id.* at 728-29. *Suitum*'s property had been classified as falling within a "Stream Environment Zone," or an area carrying runoff into the watershed. *Id.* at 729. The land-use system did not provide for variances, so the Court found that the agency's finding was sufficiently final to satisfy the ripeness doctrine. *Id.* at 739.

¹⁷² *Id.* at 747.

The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop *his* land. The latter is valuable, to be sure, but it is a *new* right conferred upon the landowner in exchange for the taking, rather than a *reduction* of the taking.

Id.

¹⁷³ *Id.* at 750.

¹⁷⁴ *Id.* at 748.

¹⁷⁵ *Id.* at 749-50. In contrast to Justice Scalia's close reasoning in *Suitum*, Justice Rehnquist appeared simply to have assumed in his *Penn Central* dissent that TDRs would be classified as compensation. *Penn Central*, 438 U.S. at 150-52.

current mood of the courts, status as compensation, not residual value, seems to be the most likely outcome.¹⁷⁶ Moreover, the goal of fairness to private landowners would be evaded if TDRs were merely a way for government to avoid admitting to (and *fully* compensating) takings of private property.

Of course, regulatory restrictions on some sending sites will not necessarily create a taking—and no compensation will be due under takings law—if economically viable uses for the property remain.¹⁷⁷ Nevertheless, because one of the many goals of TDR programs is to remove some of the unfair impacts of land-use regulations, creation of TDRs is still appropriate on such sites. That is, TDRs should not be thought of *only* as compensation for takings.

B. Receiving-Site Challenges

Receiving sites are areas the government has designated as eligible for an *increase* in development, so the regulatory structure of TDR programs will not ordinarily create regulatory-takings challenges with respect to those sites. However, the receiving-site element of TDR programs may be vulnerable in other ways.

¹⁷⁶ Putting TDRs on the taking rather than the just-compensation side of the equation (as the Ninth Circuit did below) is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings-clause jurisprudence: Whereas once there *is* a taking, the Constitution requires just (i.e., full) compensation, a regulatory taking generally does not *occur* so long as the land retains substantial (albeit not its full) value. If money that the government-regulator gives to the landowner can be counted on the question of whether there *is* a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here. It would be too obvious, of course, for the government simply to say “although your land is regulated, our land-use scheme entitles you to a government payment of \$1,000.” That is patently compensation and not retention of land value.

Suitum, 520 U.S. at 747-48 (Scalia, J., concurring) (internal citation omitted). For other articles discussing the treatment of TDRs as compensation versus residual value see generally Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 653 (2005); Jordan C. Kahn, *Lake Tahoe Clarity and Takings Jurisprudence: The Supreme Court Advances Land Use Planning in Tahoe-Sierra*, 26 ENVIRONS L. & POL’Y J. 33 (2002); see also Calvert G. Chipchase, *From Grand Central to the Sierras: What do we do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43 (2004).

¹⁷⁷ See *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1030 (1992) (holding that a regulation that denies all economic use of land constitutes a taking).

1. Strategic Zoning and Overdensification

Critics often charge that governments engage in “strategic zoning,” using TDR programs to set the baseline zoning of receiving sites at a level below that realistically desirable for those areas.¹⁷⁸ Since the success of TDR programs depends on the existence of markets for development rights, there is an incentive for government to set zoning artificially low in receiving-site areas,¹⁷⁹ thereby necessitating purchase of TDRs before development can occur. Such manipulation of zoning regulations is especially disturbing when governments profit from TDR sales through the maintenance of TDR banks.¹⁸⁰ A local government intent on ensuring TDR sales could engage in strategic zoning by downzoning receiving zones with the primary goal of raising TDR prices and the volume of TDR sales.¹⁸¹ Critics assert that, because site development in such cases is restricted without a legitimate zoning purpose, the regulations lack a rational basis, and therefore violate developers’ substantive due-process rights.¹⁸²

Conversely, where baseline zoning initially is set at *desirable* levels, critics argue that TDR programs will result in “overdensification.” In other words, governments will permit receiving-site developers to use TDRs to exceed desirable development use or capacity, thus subverting the goals of the comprehensive plan and holistic zoning.¹⁸³ Since the baseline zoning already is set to accommodate desirable development levels, it would seem to follow that using TDRs to add further development will result in overdevelopment. As with strategic zoning, overdensification is subject to due-process challenges by opponents of the added growth, possibly on the grounds that the practice amounts to a type of illegitimate spot zoning.¹⁸⁴

TDR advocates argue that these criticisms misconstrue the nature of TDR programs, and more generally misunderstand the

¹⁷⁸ Norman Marcus, *Transferable Development Rights: A Current Appraisal*, PROB. AND PROP., Mar.- Apr. 1987, at 40, 41; Jennifer Frankel, *Past, Present, and Future Challenges to Transferable Development Rights*, 74 WASH. L. REV. 825, 843-46 (1999).

¹⁷⁹ Stevenson, *supra* note 143, at 1360.

¹⁸⁰ *Id.* at 1361-62.

¹⁸¹ *Id.* at 1359.

¹⁸² Marcus, *supra* note 178, at 40; Frankel, *supra* note 178, at 843-46.

¹⁸³ Stevenson, *supra* note 143, at 1360; Frankel, *supra* note 178, at 843-46.

¹⁸⁴ Frankel, *supra* note 178, at 843-46.

nature of zoning regulations themselves.¹⁸⁵ First, zoning regulations are never enacted as the only logical arrangement of beneficial uses in an area.¹⁸⁶ Planning for flexibility in the actual capacity of a given site only recognizes that a range of uses may be appropriate, and allows diverse development within market-responsive bounds.¹⁸⁷ Second, when excess zoning *is* allowed, governments can assert a legitimate health, safety, and welfare purpose: to curtail growth at the sending site and provide incentives for implementing the favored uses at the receiving site. The connection between these goals and local variations in baseline zoning seems to be “rational” enough to survive the rational-basis review that the courts currently apply to substantive due-process claims.¹⁸⁸

Finally, excess growth at a receiving site does not necessarily work against the goals of a comprehensive plan because the area’s overall densities are maintained by restricting sending-site uses. Drafters of TDR plans can further immunize their programs from accusations of spot zoning by creating strong legislative criteria for receiving sites, rather than leaving them to individual discretionary qualification.¹⁸⁹

2. *Exactions: Distinguishing Nollan and Dolan*

The preceding arguments may be enough to address concerns regarding overdensification, but the issues involved in strategic zoning seem to fall within the complex realm of exactions law. As an alternative to limiting development, the government may

¹⁸⁵ Costonis, *supra* note 122, at 628-31.

¹⁸⁶ *Id.* at 630.

¹⁸⁷ *Id.* at 628-31.

¹⁸⁸ See MacPherson v. Dep’t of Admin. Serv., No. S52875 (Or. Feb. 21, 2006) available at <http://www.publications.ojd.state.or.us/S52875.htm>.

When a statute does not implicate a fundamental right, a party challenging that statute on substantive due process grounds must show that the statute bears no reasonable relation to a legitimate state interest. . . . The people, in exercising their initiative power, were free to enact Measure 37 in furtherance of policy objectives such as compensating landowners for a diminution in property value resulting from certain land-use regulations or otherwise relieving landowners from some of the financial burden of certain land-use regulations. Neither policy is irrational; no one seriously can assert that Measure 37 is not reasonably related to those policy objectives.

Id. (citation omitted).

¹⁸⁹ Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?*, 39 NAT. RESOURCES J. 459, 481-83 (1999).

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condition development on an “exaction,” or a “concession of property interests” mitigating the public burden that would otherwise justify limiting use or capacity.¹⁹⁰ However, the courts have opposed making private parties carry an unfair share of that burden.¹⁹¹

Exactions, therefore, have been subject to heightened judicial scrutiny, most famously enunciated in the Supreme Court’s *Nollan* and *Dolan* decisions.¹⁹² Under *Nollan*, an exaction must be related by an “essential nexus” to the legitimate state interest it seeks to advance.¹⁹³ Under the later *Dolan* decision, an exaction must additionally be roughly proportional to the impact caused by the development.¹⁹⁴ Jurisdictions vary in their interpretations of the scope of *Nollan* and *Dolan*, and for those instances in which the *Nollan/Dolan* principles are found inapplicable, state and circuit courts have developed differing standards of scrutiny.¹⁹⁵

¹⁹⁰ *Hammer v. City of Eugene*, 202 Or. App. 189, 192, 121 P.3d 693, 695 (2005).

¹⁹¹ Justice Rehnquist’s *Penn Central* dissent noted the importance of balancing the burdens with the advantages created by a new law, a process referred to as “average reciprocity of advantage.” In that case, Rehnquist determined that the burden was impermissibly imposed on a very select group of property owners, while all of the city benefited. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 147-48 (1978) (Rehnquist, J., dissenting).

¹⁹² In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court found that an exaction requiring a public easement across a private owner’s beach did not share an “essential nexus” with the government’s stated purpose of maintaining the public’s “psychological access” to the beach. *Id.* at 838-39. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court required a quantified determination by the local government that a dedication for a bike path would ease traffic in proportion to the traffic congestion caused by the plaintiff’s commercial development. *Id.* at 395-96.

¹⁹³ *Nollan*, 483 U.S. at 837.

¹⁹⁴ *Dolan*, 512 U.S. at 395.

¹⁹⁵ Questions have arisen whether *Nollan* and *Dolan* are applicable to non-dedictory conditions on development, since both cases involved physical dedication requirements, and whether the *Nollan/Dolan* standards are applicable to legislatively required exactions, since both cases instead involved site-specific development conditions. See Miller, *supra* note 189, at 480-82. See also, *Blue Jean Equities West v. City and County of San Francisco*, 4 Cal. Rptr. 2d 114 (Cal. Ct. App. 1992); compare *City of Monterey v. Del Monte Dunes Monterey, Ltd.*, 256 U.S. 687, 702-03 (1999) (characterizing *Nollan* and *Dolan* as applying to exaction and defining exactions as “land-use decisions conditioning approval of development on the dedication of property to public use”). Other courts, however, hold that the *Nollan/Dolan* test applies to monetary exactions also. See Ehrlich v. Culver City, 911 P.2d 429 (Cal. 1996). See generally Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 479 (1995); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859 (1995).

In a TDR program, receiving sites are restricted to a base capacity or use, unless TDRs are purchased to exceed those base-level restrictions. The purchase of development rights is therefore a condition on making the desired use of the land. This condition seems similar to impact fees,¹⁹⁶ and thus may be considered a monetary exaction.

A majority of courts have held that the *Nollan/Dolan* tests do not apply to monetary exactions.¹⁹⁷ By contrast, in *Ehrlich v. Culver City*, the Supreme Court of California held that, while legislatively imposed fees are not subject to the *Nollan/Dolan* calculus, non-legislatively imposed fees are.¹⁹⁸ Some courts have begun to follow *Ehrlich*.¹⁹⁹

Oregon courts have ruled that legislatively enacted monetary exactions are *not* subject to heightened scrutiny under *Dolan*.²⁰⁰ Thus, if the TDR program is legislatively created and uses formulas to determine the cost of TDR rights and the limits on their use, it would presumably qualify as “a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee.”²⁰¹ As such, even among those courts that

¹⁹⁶ See *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 136 (Fla. 2000) (applying the “rational nexus” test to impact fees); see generally Fred P. Bosselman & Nancy E. Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L. REV. 381 (1985).

¹⁹⁷ J. David Breemer, *The Evolution of the “Essential Nexus”*: How State and Federal Courts Have Applied *Nollan* and *Dolan* and Where They Should Go from Here, 59 WASH. & LEE L. REV. 373, 387 (2002).

¹⁹⁸ *Ehrlich*, 911 P.2d at 433.

¹⁹⁹ See, e.g., *Town of Flower Mound v. Stafford Estates L.P.*, 71 S.W.3d 18, 24 (Tex. App. 2002) (applying *Nollan/Dolan* to an exaction requiring improvements to a public street); *Home Builders Ass’n of Dayton v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (upholding a roadway exaction); *Clark v. City of Albany*, 137 Or. App. 293, 299-301, 904 P.2d 185, 189-90 (1995) (applying *Dolan* where a permit was conditioned on a landowner spending money to provide improvements for the public benefit); *Benchmark Land Co. v. City of Battle Ground*, 972 P.2d 944, 950 (Wash. Ct. App. 1999) (holding that *Nollan/Dolan* apply where a city conditions approval on a developer’s willingness to incur substantial costs improving an adjoining street), *aff’d on other grounds*, 49 P.3d 860 (Wash. 2002).

²⁰⁰ *Rogers Machinery, Inc. v. Washington County*, 181 Or. App. 369, 399-400, 45 P.3d 966, 983 (2002). The Ninth Circuit has been similarly inclined. See *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (monetary exaction outside of *Nollan* standard); *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (legislative and monetary exactions fall outside *Dolan* requirements).

²⁰¹ *Rogers Machinery*, 45 P.3d at 983.

have followed *Ehrlich*, the program would not be subject to the *Nollan/Dolan* tests, which are instead aimed at constraining quasi-judicial determinations of development conditions for individual projects.²⁰²

In the absence of a clear federal test applicable to legislatively enacted monetary exactions, Oregon courts have yet to clearly enunciate a test of their own. In the recent *Homebuilders Association* case, the Oregon Court of Appeals noted this deficit and weighed the parties' arguments for the "reasonable relationship test" (enunciated in *Ehrlich* and the recent *San Remo* decision)²⁰³ and a more lenient rational basis review.²⁰⁴ The court found that the exaction in the case passed both tests, and so no decision was issued as to which standard was the more appropriate.²⁰⁵ In dicta, however, the court seemed to regard rational-basis review as more appropriate, and noted that a monetary exaction logically would fall outside takings doctrine, since paying compensation for a monetary "taking" would be rather redundant.²⁰⁶

Additional protection against exactions challenges may be built into TDR programs by retaining zoning-law provisions allowing variances. With variance procedures available, paying TDR fees would not be the only way for developers to get permit approval. However, care must be taken to adjust variance standards when implementing TDR programs to ensure that the TDR market is not flat-lined by easy, cheap variance availability.

3. *Can you Pay to Play?*

The reasoning of a 1987 New York decision, *Municipal Art Society v. City of New York*, raises a troubling concern.²⁰⁷ There,

²⁰² *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park and Recreation Dist.*, 185 Or. App. 729, 736-37, 62 P.3d 404, 409 (2003).

²⁰³ *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105-06 (Cal. 2002).

²⁰⁴ *Homebuilders Ass'n*, 185 Or. App. at 736-41, 62 P.3d at 409-11. The reasonable relationship test, as clarified in *San Remo*, holds that fees must bear a reasonable relationship, in both amount and intended use, to the "deleterious public impact of the development." *San Remo*, 41 P.3d at 105. The court in *Homebuilders Association* noted that the *San Remo* court seemed to enunciate a standard that would allow any fee that fell short of "arbitrary and extortionate" to pass muster, bringing the reasonable relationship test so close to rational review as to escape easy differentiation. *Homebuilders Ass'n*, 185 Or. App. at 739, 62 P.3d at 410.

²⁰⁵ *Id.* at 740, 62 P.3d at 411.

²⁰⁶ *Id.*

²⁰⁷ 522 N.Y.S.2d 800 (N.Y. Sup. Ct. 1987).

the court determined that a sale of city property to a private developer was impermissible because the contract for sale included a condition effectively increasing the property's purchase price by \$57 million in the event the developer received a density bonus.²⁰⁸ Although the court found that the standard criteria for granting the bonus may have been fulfilled, the "government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items."²⁰⁹ The court specifically objected to the fact that the transaction's proceeds were not applied to improving neighborhood amenities, which would have reduced the project's impact on the local community, but instead went into the general city coffers.²¹⁰

Applying the New York court's reasoning to TDR programs, it would be important to avoid making TDRs a proxy for crude government kickbacks by connecting fees paid for TDRs to the conferral of a public benefit. If TDRs are purchased on the public market, *Municipal Art Society* would not be implicated because it would be the sending-site owner, not the government, receiving profit from the sale. If purchases are instead made from a TDR bank, this concern might be addressed, among other ways, by using the funds to further the TDR program, purchase TDRs from sending sites, and make outright purchases of easements and dedications. The permissibility of assessments of this type in the case of TDR purchases is not yet clear. In the case of similar assessments, such as impact fees, permissibility seems to stem in large part from the benefits they confer in relation to the burdens caused by the development.²¹¹

C. Other Concerns Regarding TDR Programs

1. Antitrust Issues

When crafting a TDR program, care must be taken to avoid antitrust issues.²¹² These issues may arise where the government controls too many elements of the market (such as price-setting for TDRs) and assumes a role as sole purchaser or seller of

²⁰⁸ *Id.* at 800-01.

²⁰⁹ *Id.* at 804.

²¹⁰ *Id.* at 803-04.

²¹¹ Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 URB. LAW. 491, 492-95 (1993).

²¹² Stevenson, *supra* note 143, at 1362-63.

TDRs, without room for interaction of private participants.²¹³ Although states are exempted from antitrust liability by the “state actor” doctrine expressed by the Supreme Court in *Parker v. Brown*,²¹⁴ local governments are not always immune. First, the state actor doctrine extends to local governments only when a municipality’s restriction of competition is an “authorized implementation” of clearly articulated state policy.²¹⁵ Second, even this inherited immunity may be abrogated if the locality enjoys broad home-rule authorization.²¹⁶ Finally, although local governments enjoy statutory protection from damages liability under the Clayton Antitrust Act,²¹⁷ they may be subject to injunctions under section 26 of that Act.²¹⁸

Thus, because local governments may be vulnerable to antitrust claims, they must structure TDR programs so as to avoid them. A primary strategy for avoiding antitrust problems is to ensure that private sales are allowed.²¹⁹

2. Supply/Demand Problems

TDR programs are vulnerable to supply and demand failures for many reasons. A major one is public distrust of government. Unfortunately, current controversies over land-use issues tend to render suspect any government efforts to address those issues. Therefore, because the success of the TDR program depends on the trust that both buyers and sellers have in the system, it is crucial that the program be thoroughly publicized and explained, and public concerns addressed, before actual implementation begins.²²⁰

Next, program planners must address supply-side issues to ensure that sufficient sending sites are available to serve as TDR “stockyards” for the program, which in many instances may last into the foreseeable future.²²¹ Planners must carefully calculate

²¹³ *Id.*; see also *Cnty. Comm’n Co. v. Boulder*, 455 U.S. 40 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365 (1991) (representing the primary cases in municipal antitrust law).

²¹⁴ 317 U.S. 341 (1943).

²¹⁵ *Omni Outdoor*, 499 U.S. at 370.

²¹⁶ *Stevenson*, *supra* note 143, at 1364.

²¹⁷ 15 U.S.C.A. §§ 34-36 (2006).

²¹⁸ 15 U.S.C.A. § 26 (2006).

²¹⁹ *Stevenson*, *supra* note 143, at 1365.

²²⁰ See PRUETZ, *supra* note 120, at 120-23.

²²¹ *Id.* at 130-31.

the number and type of TDRs produced by sending sites and match them with the calculated demand to be created by designated receiving sites.²²² Such calculations will include adjustments to both (1) the quantity of qualifying sending and receiving sites, and (2) the quantity and type of TDRs available to each site.²²³ Consultations between the relevant government body and land economists are essential.

In addition, governments considering TDR programs must consider the effect that other provisions of local land-use law will have on TDR supply and demand. Demand for TDRs suffers if zoning regulations are so lenient, or development so slow, that developers are not interested in paying for additional capacity.²²⁴ As previously discussed, TDR values may suffer from administrative undercutting when variance standards are set too loosely, or when other (free) development bonuses are plentiful.²²⁵ For example, Portland's Johnson Creek Basin District allows both density bonuses and TDRs, and the success of that TDR program may be suffering as a result.²²⁶

3. *Pricing the Commodity*

Maintaining fair prices for TDRs is crucial to program success because it ensures steady demand for the commodity and helps avoid takings challenges.²²⁷ If regulations do create a taking, compensation, whether in the form of TDRs or money, will be legally required; thus, a TDR pricing mechanism is needed. In *Lucas*-type takings (where all economic value has been taken), finding a price is relatively easy—plaintiffs are entitled to fair market value based on either their purchase price or the market price of similarly situated parcels.²²⁸ By contrast, pricing is more difficult in cases where regulation simply creates incremental losses in value. But the task is nonetheless necessary if a market is going to exist; at least one court has held that mere conference of TDRs without a guaranteed market “fails to assure preserva-

²²² *Id.*

²²³ *Id.* at 63-72, 131.

²²⁴ *Id.* at 70-72.

²²⁵ *Id.*

²²⁶ *Id.* at 314-15.

²²⁷ See *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747-50 (1997) (Scalia, J., concurring).

²²⁸ See generally *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992).

tion of the very real economic value of the development rights as they existed when still attached to the underlying property.”²²⁹

Although the Supreme Court has not ruled specifically on the issue of TDR valuation, at least two cases indicate that it will pay special attention to valuation issues when it considers the legitimacy of TDR programs. As discussed above, the Court’s decisions in *Suitum* and *Penn Central* illustrate that TDR valuation will be important in deciding (1) whether sufficient compensation has been given for a taking (if TDRs are counted as compensation), or (2) whether a taking has occurred in the first instance (if TDRs are counted as residual value).²³⁰

TDR banks are the most obvious way to provide the logistical and price support required to guarantee value. If a taking has not occurred, a decision must nevertheless be made as to whether TDRs will be calculated to offer full—or something less than full—compensation for the value lost as a result of a particular regulation.

V

POSSIBLE MODELS: CENTRALIZATION OR DECENTRALIZATION?

Setting aside the question of the shape a detailed TDR scheme in Oregon might take (i.e., land banks, density bonuses, valuation, etc.), one must consider what level of government (or combination of levels of government) would be responsible for administering the program. There are three possible paradigms: (1) a state-level TDR program implemented by an agency; (2) a specific state delegation to localities (whether counties or municipalities); or (3) a state-authorized program managed according to some type of cooperative regional arrangement between localities.

Each paradigm represents a particular attitude toward the appropriate level at which to lodge power. While Oregon is not a Dillon’s Rule state²³¹ with complete legislative supremacy over localities, Oregon is also not a state that grants localities strong home-rule autonomy, particularly after the 1978 *City of La*

²²⁹ Fred F. French Investing Co. v. City of New York, 39 N.E.2d 381, 388 (N.Y. 1976).

²³⁰ See *supra* Part IV.A.

²³¹ *Home Rule in Oregon Cities: A 20th Century Odyssey*, The City Ctr. at the League of Oregon Cities, Dec. 2001, at 7.

Grande case.²³² However, Oregon is a state that has at moments in its past been willing to experiment in its local-government law. For example, the 1973 comprehensive state land-use scheme established pursuant to Senate Bill 100 created a state agency, the Land Conservation and Development Commission (LCDC), to promulgate statewide land-use goals.²³³ The LCDC scheme was an interesting blend of top-down and bottom-up land-use planning: localities were able to craft their own land-use rules as long as they could be squared with the overarching LCDC goals.²³⁴

A second state experiment has been the establishment and growth of Portland Metro, a regional entity encompassing three counties and over twenty cities with a grant of home-rule authority from the State and a specific set of cross-jurisdictional powers.²³⁵ Metro was, to a certain extent, an admittedly top-down imposition by the Legislature on the cities and counties involved. However, to the extent that Metro's structure allows localities to retain a say in Metro governance and significant exclusive jurisdiction over certain matters, Metro's regional coordination has not fomented the level of opposition and resistance from local governments that might otherwise occur.²³⁶

If the Oregon Legislature were to consider a TDR component as part of its pending "Big Look" at land-use planning, what forms might such a component take?

²³² *City of La Grande v. Pub. Employees Ret. Bd.*, 281 Or. 137, 576 P.2d 1204 (1978).

²³³ Dept. of Land Conservation and Dev., *Statewide Planning Goals*, <http://www.lcd.state.or.us/LCD/goals.shtml> (last visited Apr. 21, 2006); see Aoki, *supra* note 10, at 426-27.

²³⁴ The 1973 passage of Senate Bill 100 created the LCDC to adopt statewide goals that serve as guidelines for local government in implementing comprehensive plans consistent with the statewide goals. See *Statewide Planning Goals*, *supra* note 233.

²³⁵ Metro Charter (text), available at <http://www.metro-region.org/article.cfm?ArticleID=629>; see also Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames the Dilemma for State Constitutionalism*, 76 OR. L. REV. 909 (1997).

²³⁶ See Aoki, *supra* note 10, at 427-30 (discussing the formation of Metro). But see *City of Sandy v. Metro*, 200 Or. App. 481, 488-94, 115 P.3d 960, 964-67 (2005) (pitting local governments against Metro for a determination of where Metro's power ends and the power of local governments begins). For an exemplification of the opposition to land-use planning, see also groups and think-tanks opposed to land-use planning such as Oregonians In Action, <http://www.oia.org/>, The Thoreau Institute, <http://www.ti.org/> and The Reason Foundation, <http://www.reason.org/growth>.

A. *Statewide TDR Control*

In a statewide TDR scheme, administration would be lodged at the state level by creation of a TDR Commission or other similar entity.²³⁷ Such a commission would be empowered to designate sending and receiving sites, craft eligibility standards for creation and transfer of TDRs, and possibly administer a statewide TDR bank.²³⁸

Advantages to such a statewide entity include: the alleviation of inconsistent and idiosyncratic implementation of localized TDR schemes; the allowance of increased deliberation facilitated by insulation from local political pressures; better decision-making; and a reduction of inefficient duplicative efforts spurred by the achievement of economies of scale.²³⁹

Still, such a statewide scheme might involve many problems. For instance, administrative ignorance of local land-use practices and needs might create substantial difficulties, especially considering Oregon's diverse geography (mountains, high deserts, river valleys, farm and ranching land, the coastal region, and densely populated urban areas). This diversity could yield very real differences and incommensurabilities in the types of sending and receiving sites needed as well as in the supply of and demand for different types of TDRs, thus hindering the formation of a coherent statewide TDR market.

The question of political accountability dogs statewide agencies in Oregon,²⁴⁰ particularly given the geographical and politi-

²³⁷ Former State Representative and current State Senator Kurt Schrader introduced a TDR bill in the Oregon House (HB 3998, 71st Or. Legis. Ass'y (2001)) in response to Measure 7. More recently, in February 2005, Schrader introduced Senate Bill 406 as a potential solution to the Measure 37 debate. S.B. 406 73rd Or. Legis. Ass'y (2005). While neither passed, Schrader's bills could provide guidance in implementing a statewide TDR program.

²³⁸ Precedent for such an entity can be found in the LCDC. *See supra* text accompanying notes 233-234. The LCDC promulgates statewide goals or the rules associated with statewide land-use guidelines. *See* Dept. of Land Conservation and Dev., *supra* note 233 (explaining the history of and laying out Oregon's nineteen statewide land-use goals).

²³⁹ *See* GERALD E. FRUG ET AL. LOCAL GOVERNMENT LAW, 1-17 (3d ed. 2001) (discussing the tension between Alexis de Tocqueville's decentralized government and centralized government as espoused by James Madison in The Federalist Number 10).

²⁴⁰ This is a foundational problem of administrative law generally. *See generally* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); *see also* David B. Frohnmayer, *The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform*, 58 OR. L.

cal diversity of the state.²⁴¹ For example, residents' needs regarding preservation of agricultural lands may be very different in the Willamette Valley than in eastern Oregon. A statewide TDR agency drawing personnel largely from the Willamette Valley might have difficulty making representative decisions with respect to resource needs and property values in other areas of Oregon.

Finally, theoretical efficiencies of scale might not actually translate into efficient implementation of TDR plans. Bureaucratic delay and mission drift may be more likely at the statewide level than at the local level.²⁴² Furthermore, it might be maddeningly unclear how and to what extent statewide rules implementing a TDR scheme would preempt local land-use powers, and to what extent localities might enjoy autonomy from state preemption by asserting that such land-use rules affect purely local matters.²⁴³

REV. 411, 449-50 (1980) (noting that the Oregon Administrative Procedure Act contains several provisions that attempt to hold agencies accountable to the electorate by front-loading notice requirements).

²⁴¹ This issue has been raised repeatedly in respect to Oregon judicial elections because of overwhelming demographic representation of judges from the Willamette Valley to the exclusion of judges from southern or eastern Oregon. See BILL BRADBURY, OREGON BLUE BOOK 2005-2006, at 302 (2005) (noting that in Measure 22, which failed by approximately 14,000 votes on the November 2002 ballot, would have amended the Oregon Constitution to require Oregon appellate judges to be elected by district).

²⁴² See *supra* note 238 (discussing the bureaucratic inefficiencies inherent in large administrative agencies).

²⁴³ There are four primary ways to determine what is purely local. First, the categorical approach, advocated by John Stuart Mill, argues that governmental functions should be split in two, allocating those functions "best served" centrally to the central government and those best served locally to the local government. Mill felt that issues could be categorized as "purely local matters" or "matters of statewide and national concern." John Stuart Mill, *On Representative Government*, in FRUG ET AL. *supra* note 239, at 171, 171-77.

The question remains how you determine which is which: how do you find a zone of local autonomy in a system that is heavily skewed toward centralized government? In *City of La Grande v. Public Employees Retirement Board*, 281 Or. 137, 576 P.2d 1204 (1978), Justice Hans Linde, writing for a majority of the Oregon Supreme Court, held that home rule only grants control over local-government organization and procedures. Article XI of the Oregon Constitution was only intended to allow local governments to determine their own organizational structures without requiring legislative approval. This represents the "legislative supremacy" approach, which holds that centralized government is more equipped to determine proper governance. By contrast, Justice Tongue's dissent in *La Grande* states that:

the 'home rule' amendments to the Oregon Constitution granted to Oregon cities exclusive power to legislate as to all matters of 'local interest' i.e., a grant of 'local autonomy,' free from intervention by the state legislature,

Thus, technical and administrative hurdles may present serious roadblocks to statewide application. A statewide market would mean heightened complexity, and differences in local geography and development needs would make setting universal standards for availability and variety of TDRs an administrative nightmare.²⁴⁴ Nevertheless, state-created programs have proven to be workable when limited in scope. For example, New Jersey's Pinelands project is state-created and administered, but covers only a relatively small geographic region.²⁴⁵

At the very least, a centralized statewide TDR scheme would leave some notable gaps to fill and questions to confront. How might a decentralized model that locates more power in localities compare?

B. Local TDR Control

In place of a statewide plan, Oregon could consider a TDR scheme in which local governments implement their own programs.²⁴⁶ In contrast to the State, which enjoys plenary authority, local governments must identify some specific provision of state law that authorizes local creation of programs with TDR features.²⁴⁷ There are two methods by which local governments

and with the courts as the arbiters of disputes between cities and the state as to what are matters of 'local interest.'

Id. at 157, 576 P.2d at 1216-17. Justice Tongue advocates for the "balancing approach" that Oregon followed prior to the *La Grande* decision.

Finally, in *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992), the California Supreme Court adopted the "matters of statewide concern" approach, stating, "When the local matter under review 'implicates a "municipal affair"' and poses a genuine conflict with state law, the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted." *Id.* at 996.

²⁴⁴ The reality is that Oregon's varying geography and population density would hinder a statewide TDR scheme.

Given Oregon's extremely diverse geology, it is surprising that most people, including Oregonians, accept the generalization that Oregon is best divided into two geographic regions: the western coast and valleys, and the eastern and central high deserts. In fact, the state, especially its eastern section, is much more subtle.

BILL McRAE ET AL., *LONELY PLANET, PACIFIC NORTHWEST: OREGON & WASHINGTON* 125 (2d ed. 1999).

²⁴⁵ See PRUETZ, *supra* note 120, at 215-21 (describing the Pinelands TDR program).

²⁴⁶ See John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2002).

²⁴⁷ *Id.* at 377.

might come by such authority: by presumption of home-rule power or by express legislative enabling act.

1. Plans Based on “Home Rule” Power

The Oregon Constitution’s home-rule provision provides that the “legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon.”²⁴⁸ State courts consistently have upheld the validity of local enactments under this provision except where local regulations conflict with state statutory or constitutional law, or where state preemption clearly is intended.²⁴⁹ Additionally, the Oregon Supreme Court has established a presumption in civil matters that preemption is *not* intended,²⁵⁰ although the home-rule provision is subject to certain judicially imposed limitations under *City of La Grande*.²⁵¹

The City of Portland has created a home-rule TDR program in an urban context. The Portland Program utilizes three major sending-site areas: (1) the Skyline District is designated to preserve open space and agriculture; (2) the Johnson Creek Basin is designated to preserve open space and protect sensitive environmental areas (including Johnson Creek itself and the Boring Lava Domes); and (3) sites in the Central City District are designated to preserve low-income housing, open space, and historic buildings.²⁵²

²⁴⁸ OR. CONST. art. XI, § 2 (1859, amended 1910).

²⁴⁹ *City of La Grande v. Pub. Employees Ret. Bd.*, 281 Or. 137, 148-49, 576 P.2d 1204, 1211 (1978); *Ashland Drilling, Inc. v. Jackson County*, 168 Or. App. 624, 634-35, 4 P.3d 748, 757 (2000).

²⁵⁰ See *La Grande*, 281 Or. 137 at 148-49, 576 P.2d at 1211.

²⁵¹ The *City of La Grande* decision established that Oregon’s home-rule provision only protects local governments from preemption in the case of conflict with state law when local decisions are related to the “structure” of local government. *La Grande*, 281 Or. at 156-57, 576 P.2d at 1215.

²⁵² PRUETZ, *supra* note 120, at 314. Portland’s city code provides for TDRs in Commercial zones at PORTLAND, OR. ZONING CODE § 33.130.205(C)(2006), Employment/Industrial Zones at PORTLAND, OR. ZONING CODE § 33.140.205(C) (2006), as a preservation incentive for historic property in PORTLAND, OR. ZONING CODE § 33.445.610 (2006), and in the central city master plan at PORTLAND, OR. ZONING CODE § 33.510.255 (2006). Despite these provisions, Portland’s TDR programs have not been overly utilized. In fact, Portland serves as an excellent example of the importance of a market in TDR programs. Interviews with several land-use attorneys and a planner in Portland revealed that the Portland TDR program’s primary challenges come from the general upzoning of downtown Portland and the ability of developers to get density bonuses by engaging in desired development.

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But the home-rule model of TDRs carries inherent drawbacks, most notably statewide inconsistency and inefficiency.²⁵³ Such problems give rise to the argument that TDR programs do not address “local” problems at all, but are better conceived as a statewide solution for a statewide problem.²⁵⁴ In some ways, although not in the specific context of a TDR program, events occurring between the passage of Measure 37 in November 2004 and the lower court’s *MacPherson*²⁵⁵ decision in October 2005 illustrate the potential pitfalls of a locality-by-locality approach. In implementing Measure 37, some local governments decided to deter claim filings with high filing fees,²⁵⁶ while others were inclined to avoid paying claims by granting blanket waivers.²⁵⁷ Moreover, there was no standardized statewide procedure for making property valuations associated with Measure 37 claims. And because there was no standardized Measure 37 procedure, advising landowners on how to make Measure 37 claims became a cottage industry virtually overnight.²⁵⁸

Telephone Interview with Ty K. Wyman, Of Counsel, Dunn, Carney, Allen, Higgins & Tongue LLP, in Portland, Or. (Jan. 4, 2006); Telephone Interview with Mark D. Whitlow, Partner, Perkins Coie LLP, in Portland, Or. (Jan. 4, 2006); Telephone Interview with Nicholas T. Starin, City Planner, City of Portland (Jan. 6, 2006).

²⁵³ Richard Briffault, *Our Localism Part II – Localism and Legal Theory*, 90 COLUM. L. REV. 346, 447-49 (1990); see generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (discussing the strengths and weaknesses of home rule).

²⁵⁴ See *supra* note 241 (discussing the four primary ways to determine what is a purely local matter).

²⁵⁵ *MacPherson v. Dep’t of Admin. Serv.*, Civil No. 05-C10444 (Cir. Ct. Marion County, Or. Oct. 14, 2005) available at http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf.

²⁵⁶ See Schellene Clendenin, *Unusual M-37 Proposals*, NEWBERG GRAPHIC (Newberg, Or.), Mar. 9, 2005, available at <http://www.newberggraphic.com/news/archive/3-9-05/index.htm> (noting Multnomah County’s \$12,500 filing fee for Measure 37 claims).

²⁵⁷ See David Bates, *County 1st in State to OK Claims*, NEWS-REGISTER (McMinnville, Or.), Feb. 3, 2005, available at http://www.newsregister.com/news/results.cfm?story_no=189907 (discussing Yamhill County granting waivers for Measure 37 claims). But see Marian Hammond, *Governor Press Release*, Dec. 1, 2004, available at http://governor.oregon.gov/Gov/p2004/press_120104a.shtml (calling on “all state and local regulatory entities to refrain from immediate responses and blanket waivers until we can ensure a sound and fair process that meets the needs of all parties.”). See also Keith Chu, *Jefferson Cty. Issues Measure 37 Waivers*, BEND BULLETIN, Apr. 28, 2005, at A1; Sinks, *supra* note 7; Lily Raff, *Deschutes County OKs M37 Claims*, BEND BULLETIN, May 12, 2005 at C1.

²⁵⁸ Examples of this cottage industry can be seen in the proliferation of materials and workshops. See, e.g., Moshofsky, *supra* note 14; OREGONIANS IN ACTION EDUCATION CENTER 2006 LAND USE FORUM, available at <http://oia.org/LookingForwardJan-Feb06.pdf>; Measure 37 Summit, Oregon Law Institute in cooperation with

2. Legislatively Authorized Plans

Alternatively, local governments would not have to construct TDR programs using a home-rule framework if the Oregon Legislature were to grant them specific power to create and manage TDRs within their respective jurisdictions.²⁵⁹ The Oregon Legislature has some limited experience with such proposals. In 2002, Deschutes County implemented a legislatively authorized TDR system in which the County granted TDRs to property owners who were denied building permits because they lacked adequate sewer hookups.²⁶⁰ These TDRs were transferable to receiving-site owners with property adjacent to a sewer hookup.²⁶¹ Additionally, former State Representative and current State Senator Kurt Schrader has introduced two—ultimately unsuccessful—bills in the past five years that would have created additional enabling legislation for local TDR programs.²⁶²

Under a legislative-authorization model, local governments could implement individual TDR schemes within broad state-wide parameters (reminiscent of the LCDC and its nineteen planning goals).²⁶³ The upside is that the State could maintain some measure of efficiency and consistency, while presumably leaving localities free to tailor TDR schemes to their individual needs. Clearly, the considerations affecting land use in Eastern Oregon are different from those in the Springfield/Eugene area, on the Oregon Coast, or in the greater Portland area; however, all of those areas might benefit from some measure of uniformity.

Miller Nash LLP, held Jan. 5, 2005, brochure and registration information, *available at* <http://www.lclark.edu/org/oli/objects/Measure37.pdf> (providing examples of some ways the groups are able to profit from the confusion created by Measure 37).

²⁵⁹ If the Legislature (or voters through the initiative process) were to grant such powers explicitly, whether or not those powers fit within the court's interpretation of the home-rule provision, OR. CONST. art. XI, § 2 (1859, amended 1910), would not matter. *See La Grande/Astoria v. Pub. Employees Ret. Bd.*, 281 Or. 137, 576 P.2d 1204 (1978).

²⁶⁰ *See* Deschutes County Community Development Department, *Overview of the TDC Program*, *available at* <http://www.co.deschutes.or.us/go/objectid/A8E46689-BDBD-57C1-9E845D6E27D06ED7/index.cfm> (providing a history and overview of the creation of the Deschutes County Transfer Development Credit Program); *See also* DESCHUTES COUNTY, OR., CODE ch. 11.12 (2004).

²⁶¹ *See* DESCHUTES COUNTY, OR., CODE ch. 11.12 (2004).

²⁶² H.B. 3998, 71st Or. Legis. Ass'y (2001); S.B. 406, 73rd Or. Legis. Ass'y (2005).

²⁶³ *See* Dept. of Land Conservation and Dev., *supra* note 233. The creation of the LCDC and the implementation of the nineteen goals resulted from the 1973 passage of Senate Bill 100. *See* Aoki, *supra* note 10, at 426-27.

3. *Advantages and Disadvantages of Local Control*

In the end, both forms of localized TDR programs, home-rule and legislatively authorized, may possess the usual benefits and drawbacks of localized control. Theoretically, such programs offer superior political accountability because local officials will be interested in pleasing their constituents. However, this could cut both ways, as local officials might be more susceptible to “capture” by developers and other wealthy factions, who may endeavor to gut TDR schemes or turn them to their unfair advantage.²⁶⁴

Localized TDR models may also suffer from interlocal competition. Since these models are premised on the autonomy and independence of each local government, there is the ubiquitous “prisoner’s dilemma,” wherein localities, acting in their own perceived (and narrow) self-interests, implement TDR schemes that advantage them and disadvantage their neighbors.²⁶⁵ The result is an undesirable “race to the bottom” between neighboring local governments.

If both centralized TDR schemes and devolved approaches present serious problems, what other approaches might be worth pursuing?

C. *Regional TDR Control*

One possible way to avoid the problems inherent to centralized and devolved approaches to TDRs involves the legislative creation of regional TDR authorities.²⁶⁶ In a state such as Oregon with several geographically distinct regions, regional TDR entities might make sense. The TDR market and goals of an area such as the Willamette Valley—which seeks balance among industrial development, agriculture, and residential uses—will normally differ from those of sparsely settled areas such as southeastern Oregon or the southern Oregon coast. Regional TDR entities could take cognizance of such differences and tailor their

²⁶⁴ See Clayton P. Gillette, *In Partial Praise of Dillon’s Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 995-98 (1991) (discussing the impact of one-sided lobbying on state and local representatives).

²⁶⁵ See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2* (1965) (providing an introduction of the prisoner’s dilemma to public goods).

²⁶⁶ See generally Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019 (2001).

TDR systems to idiosyncratic local contexts, local markets, and local goals for sending and receiving sites.²⁶⁷ Furthermore, a regional body would help ensure some cooperation among communities, facilitating a coordination of efforts often unavailable in a purely localized scheme.²⁶⁸

Both the Tahoe Regional Planning Agency (TRPA)²⁶⁹ and the Portland Metro Council²⁷⁰ are regional bodies possessing elements that may serve as helpful models for a regional TDR program.²⁷¹ The origins and structure of the TRPA were aptly described by Justice Sullivan of the California Supreme Court in 1971:

Today, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development.

In an imaginative and commendable effort to avert this imminent threat, California and Nevada, with the approval of Congress, entered into the Tahoe Regional Planning Compact The basic concept of the Compact is a simple one—to provide for the region as a whole the planning, conservation and resource development essential to accommodate a growing population within the region's relatively small area without destroying the environment.

To achieve this purpose, the Compact establishes the [TRPA] with jurisdiction over the entire region. The Agency

²⁶⁷ See FRUG ET AL., *supra* note 239, at 486-90 (excerpting AMERICAN PLANNING ASSOCIATION, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE* (phases I and II interim ed., 1998)). See also *id.* at 525-33 (excerpting Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other – and Often Agree*, 8 HOUS. POL. DEBATE 12 (1997)).

²⁶⁸ See Richard Briffault, *Localism and Regionalism*, 48 BUFF. LAW REV. 1, 23 (2000). Briffault posits that current fragmentation of metropolitan areas prevents local communities from realizing the extent of their common interests. Regional entities “would be not simply a means of allowing the regional community to control its collective fate, but also a means of bringing the regional community into being.” *Id.* See also Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993) (arguing for expanding consciousness of regional responsibilities and solidarity).

²⁶⁹ See Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969); see also *People ex rel. Younger v. County of El Dorado*, 487 P.2d 1193, 1195-99 (Cal. 1971) (providing a detailed description of the formation and structure of the TRPA).

²⁷⁰ See Aoki, *supra* note 10, at 425-34 (offering a detailed discussion of Portland Metro's structure and formation).

²⁷¹ The New Jersey Pinelands and Long Island Pine Barrens programs provide further examples of regional programs introduced at the state level. PRUETZ, *supra* note 120, at 215-21, 193-96.

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has been given broad powers to make and enforce a regional plan of an unusually comprehensive scope.²⁷²

However, despite its establishment as a regional land-use authority, many aspects of the TRPA are not on point with respect to state TDR programs. First, the TRPA is the product of a federally ratified intersovereign agreement between California and Nevada.²⁷³ Moreover, local governments in the region unsuccessfully sued the TRPA for heavy-handed interference with zoning decisions that the localities felt were within their purview.²⁷⁴ Still, there is merit in the idea that, where localities have been unable to agree, a legislature should take the initiative and create an entity addressing a pressing regional problem.

The Portland Metro Council provides a second model for regional TDR programs. As previously discussed, the Metro is a state-created regional entity encompassing multiple Oregon counties and cities. Metro was legislatively imposed, but localities retain a say in Metro governance and significant exclusive jurisdiction over certain matters.²⁷⁵

Thus, the Metro model may provide affected localities more governing voice in the regional body than the TRPA model. Additionally, Metro's elected-council feature would partially address the democratic-deficit problem of appointed agencies discussed above.²⁷⁶ If such a democratic model were followed, the question would then become one of the makeup of the regional TDR body: would it be "one government, one vote" or "one person, one vote"? Clearly, regions made up of many

²⁷² *Younger*, 487 P.2d at 1195-96 (internal citation omitted); *see also* Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 308-09 (2002) (internal citations omitted):

In the 1960's, when the problems associated with . . . burgeoning development began to receive significant attention, jurisdiction over the [Tahoe] Basin, which occupies 501 square miles, was shared by the States of California and Nevada, five counties, several municipalities, and the Forest Service of the Federal Government. In 1968, the legislatures of the two States adopted the Tahoe Regional Planning Compact The compact set goals for the protection and preservation of the lake and created TRPA as the agency assigned "to coordinate and regulate development in the Basin and to conserve its natural resources."

²⁷³ *Younger*, 487 P.2d at 1195-96.

²⁷⁴ *See id.* at 508. *See also* City of Sandy v. Metro, 200 Or. App. 481, 115 P.3d 960 (2005) (exemplifying the same principle in Oregon).

²⁷⁵ *See supra* introduction to Part V.

²⁷⁶ *See supra* note 240 and accompanying text (discussing the inherent problem of political accountability in administrative agencies).

smaller local governments would prefer the “one government, one vote” model, whereas cities like Portland, Bend, Medford and Eugene/Springfield would prefer “one person, one vote” because their large populations would translate into a greater representative share in the entity’s governance.

Regional TDR programs would, of course, come with problems of their own. For instance, inconsistencies across geographic regions inevitably would exist (although they might not match the discord that would occur between inconsistent local-government schemes). Moreover, political accountability likely would be more attenuated in a regional program than in a purely localized program, particularly if a “one government, one vote” model were followed. Another downside might be general public hostility to adding yet another layer of government bureaucracy, a move that would almost surely run contrary to many Oregonians’ preexisting libertarian bias against big government.

There is one other option for regional TDR programs. While the previous discussion of localized TDR programs describes decentralized power giving rise to interlocal competition, inconsistent results, and a “race to the bottom,” there is another possibility. What if genuinely empowered local governments instead chose to cooperate—to work together to solve the cross-jurisdictional problems that land-use laws address? Properly conceived, local governments could be the motivating force behind the creation of regional TDR entities via interlocal agreements, thus dispensing with the need for a top-down program legislatively imposed by the State. Just such an agreement has been created in Boulder County, Colorado.²⁷⁷ In fact, since the mid-1990s, several cities, counties, and unincorporated communities have entered into agreements with one another allowing the creation of TDRs on sending sites where owners agree to a preservation easement on qualifying Planned Unit Developments.²⁷⁸

In conclusion, this section has reviewed three ways of implementing a TDR scheme in Oregon: (1) a statewide TDR agency; (2) a devolved and diverse variety of TDR schemes promulgated by Oregon localities; and (3) regional TDR entities created to respect the different geographic and environmental needs and aspects of Oregon’s regions. This latter type of entity could be cre-

²⁷⁷ See PRUETZ, *supra* note 120, at 171-74 (discussing the TDR program implemented in Boulder, CO).

²⁷⁸ See *id.* at 171.

ated either by legislative fiat or by empowered localities working cooperatively with one another.

CONCLUSION

TDR programs have much to offer Oregon and other states experiencing the ever-escalating crunch between the need for development and the need to ensure that development is desirable. They offer a chance for government to address the private costs created by changing regulations without crippling state and local economies and overall quality of life in the name of private property rights. As a relative newcomer to the field in the United States, the TDR concept does not fit clearly into the pre-formed niches of our land-use jurisprudence. Some questions remain regarding the status of TDR programs in takings, exactions, and other important fields of law; those questions persist even among those who have made studied efforts to fit the programs within those niches. Nevertheless, the popularity of successful TDR programs shows that they are exceptionally useful when well applied.