MacPherson v. Department of Administrative Services: Amicus Curiae Brief of the Oregon Chapter of the American Planning Association and the American Planning Association

PREFACE BY CARRIE RICHTER AND EDWARD J. SULLIVAN: DARKNESS OVER THE LAND: A PLANNING LAWYER'S VIEW OF MEASURE 37 AND OREGON'S PLANNING PROGRAM

Text of the Brief

**PREFACE BY CARRIE RICHTER*
AND EDWARD J. SULLIVAN:****

DARKNESS OVER THE LAND: A PLANNING LAWYER'S VIEW OF MEASURE 37 AND OREGON'S PLANNING PROGRAM

In 2004, Oregon voters passed Measure 37, a statutory enactment ostensibly designed to compensate private landowners for supposed declines in their property values caused by certain land-use regulations.[1] However, as is argued at length in the amicus brief below, what the measure really does is provide windfalls to some property owners, harm the security of others, and lay waste to Oregon's revered land-use planning program.

When certain land-use regulations affect the fair market value of real property, Measure 37 requires state and local governments to either pay private landowners compensation or "modify, remove or not . . . apply" the regulations.[2] Because the measure does not provide a compensation mechanism, and Oregon's state and local governments can ill afford to pay claims, the measure essentially forces governments to waive land-use regulations, thereby undermining Oregon's comprehensive planning program. In short, the measure devastates the very program that has made Oregon's cities national models of sound land-use planning.[3]

On October 14, 2004, the Marion County Circuit Court held that Measure 37 violated an array of state and federal constitu-

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[1] *See* MacPherson v. Dep't of Admin. Serv., 340 Or. 117, 121 (2006).

[2] OR. REV. STAT. § 197.352(8) (2005).

[3] *See, e.g.*, Oregon Dep't of Land Conservation and Dev., History of the Program *available at* http://www.oregon.gov/LCD/history.shtml#Honors_and_Awards (last visited Apr. 9, 2006) (listing honors and awards).

tional provisions,[4] giving land-use planning advocates hope that the measure would suffer the same fate as its failed predecessor, Measure 7.[5] However, on February 21, 2006, the Oregon Supreme Court reversed the circuit court's decision and upheld Measure 37.

The court first addressed challenges to Measure 37 under the Oregon Constitution, holding that (1) Measure 37 does not interfere with the plenary power to legislate because lawmakers are free to enact future land-use laws and can modify or repeal the measure itself;[6] (2) Measure 37's grant of claimant status only to landowners who purchased property prior to the effective date of pertinent land-use regulations does not violate the Oregon Constitution's equal privileges and immunities clause;[7] (3) Measure 37's directive to pay compensation or "modify, remove or not . . . apply" land-use regulations does not violate the Oregon Constitution's suspension of laws provision;[8] (4) Measure 37 does not violate separation of powers principles because the measure does not improperly delegate executive power to legislative bodies, and because the measure furnishes adequate safeguards against the arbitrary exercise of delegated legislative authority;[9] and (5) Measure 37 is not an impermissible waiver of sovereign immunity because the Oregon Constitution does not prohibit the State from paying property owners for the economic consequences of land-use regulations or from waiving its immunity to allow owners to assert their claims in court.[10]

The court then addressed challenges to the measure under the Fourteenth Amendment of the U.S. Constitution, holding that (1) Measure 37 does not, on its face, violate non-claimant property owners' procedural due-process rights because nothing in the measure prohibits government bodies from adopting notice and hearing procedures to protect neighboring property owners

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[4] MacPherson v. Dep't of Admin. Serv., No. 05-C10444 (Cir. Ct. Marion County, Or. Oct. 14, 2005) *available at* http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf, *reversed by MacPherson*, 340 Or. at 117.

[5] Measure 7 was an amendment to the Oregon Constitution, also passed by ballot initiative, that was held unconstitutional by the Oregon Supreme Court in 2002. *See* League of Oregon Cities v. State, 335 Or. 645, 649, 56 P.3d 892, 896 (2002).

[6] *MacPherson*, 340 Or. at 128.

[7] *Id.* at 129-31.

[8] *Id.* at 132.

[9] *Id.* at 136-37.

[10] *Id.* at 137-38.

who may be affected by waivers of land-use regulations;[11] and (2) Measure 37 does not violate the substantive component of the Fourteenth Amendment's Due Process Clause because the measure does not implicate a "fundamental right" and is reasonably related to the legitimate policy objective of compensating landowners for regulation-induced decreases in their property values.[12] In concluding, the court stated:

> Whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview. Our 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. Here, we conclude that no such provisions have been contravened.[13]

We now know that we cannot look to the court to turn Measure 37 into a bad dream already passed. Rather, the real work starts now. In the coming months and years, Measure 37's nuances and vagaries will be determined through litigation pursued on a claim by claim basis, and local governments will be faced with inventing new ways to regulate without tripping up against the measure. Land-use lawyers and planners will be essential players in these decisions. As such, we must take the lead in guiding Oregon land use through the darkness and back into the light.

We believe the following amicus brief, filed on behalf of the *MacPherson* respondents, provides one of the most succinct and complete public-policy arguments against Measure 37 issued to date. We reproduce the substance of that brief here in the hopes that it will receive wider distribution, promote further discussion, and discourage future proliferation of planning measures similarly adverse to sound public policy, both in Oregon and across the rest of the country.

I

INTRODUCTION

The Oregon Chapter of the American Planning Association and its parent national organization, the American Planning Association, (collectively "APA"), file this amicus brief in support

[11] *Id.* at 139.
[12] *Id.* at 140-41.
[13] *Id.* at 141.

of Respondents' position in this case, i.e., that Measure 37 is invalid. APA's statement of interest in filing this brief is found in the accompanying motion.[14] Because the Court and parties are familiar with the facts and arguments, APA will not restate them here, but will rely on Plaintiff/Respondents' Brief on these matters.

In finding Measure 37 unconstitutional, the circuit court reviewed the eight grounds advanced by the Respondents in support of their claim. The circuit court concluded that the Respondents prevailed on five of those eight grounds—namely, that Measure 37 (1) undermined the plenary police power vested in the legislature, (2) violated the privileges and immunities clause of article I, section 20 of the Oregon Constitution, (3) violated the suspension of laws provision contained in article I, section 22 of the Oregon Constitution, (4) violated the separation of powers provisions of article III, section 1 of the Oregon Constitution, and (5) violated the procedural due-process guarantees of the Fourteenth Amendment to the Federal Constitution. Rather than directly address these constitutional arguments, this brief focuses on important planning policies that were furthered by the land-use program in Oregon before Measure 37 was enacted. Importantly, many of these planning concepts work to implement the constitutional protections at issue in this case.

In addition, the brief describes the planning landscape in Oregon after one year of processing claims and granting waivers pursuant to Measure 37 as well as the long-term impacts on public infrastructure and other collateral damage resulting from issuing waivers. Finally, the brief will suggest that systemic reform is a legislative process and should be approached in this manner. For the reasons set forth below, APA requests that the Court affirm the decision of the circuit court.

II

Land-Use Planning in Oregon Before Measure 37

> Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in

[14] [Editor's Note: The motion is not included with this reprinting.]

> connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, such as a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.[15]

Land-use planning in the United States is premised on the idea that unregulated growth, as opposed to coordinated growth to achieve a community vision, is an evil to be avoided. Land-use planning in Oregon is grounded on the idea that the public at large, as well as local communities, is best served by uniformly grouping and regulating uses with similar infrastructure demands and social impacts. By locating land uses with similar nuisance characteristics together, a community is able to protect its residents from incompatible and harmful uses.

The first efforts at regulating the private use of land in Oregon occurred in the City of Portland in 1918.[16] In 1925, these regulations were challenged, and this Court first upheld the use of zoning as a legitimate exercise of the police power:

> The exercise of the police power is a matter of legislation and the courts cannot interfere with such expressions of the power unless it is shown that it is purely arbitrary or that the legislation has no connection with or bearing upon legitimate objects sought to be attained. It is plain that governmental agencies entrusted with the police power, as the City of Portland is, can enact laws regulating the use of property for business purposes. Otherwise it would be permissible to erect a powdermill on the site of the Hotel Portland or to install a glue factory next to the city hall or to erect a boiler-shop adjacent to the First Congregational Church. Such things would be legitimate but for the restraint of the police power. The difference between such instances and the present contention is in degree and not in principle.[17]

Although an assertion that regulations protect the health, safety, and welfare was sufficient to uphold a land-use decision in early cases such as *Kroner*, this "traditional" view of land-use

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[15] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (internal citations omitted).

[16] PORTLAND, OR. ORDINANCE 33911 (1918). According to a City of Portland Bureau of Planning publication dated December 1957 and entitled, *The Portland Planning Commission: An Historical Overview*, City Ordinance No. 34870 first established the Portland Planning Commission in 1918. PORTLAND, OR. ORDINANCE 34870 (1918). The Planning Commission was established to make recommendations on City growth. After a failed citywide vote in November, 1920, the Portland Zoning Code was first adopted in 1924, Cat. No. 3013. No ordinance citation available.

[17] Kroner v. City of Portland, 116 Or. 141, 151, 240 P. 536, 539 (1925).

regulation was replaced by a more skeptical view in a series of cases from the 1940s through 1969. In those more skeptical court cases, this Court struck down rezoning decisions finding that a neighborhood had a "right to rely" on existing land-use regulations, and the regulations could only be changed if the local government could show a change in the community or a mistake in the original zoning classification.[18]

The case that finally merged the traditional and skeptical views of land-use regulation was *Fasano v. Board of Commissioners of Washington County* in 1973.[19] *Fasano* struck down a rezoning, not on the grounds that it constituted "spot zoning" or because there existed a "right to rely" on existing regulations, but rather because of the manner in which the local government had made the zoning decision and the public process it had followed. The legacy of *Fasano* requires local governments to make zoning decisions that are consistent with their comprehensive plans, land-use regulations, and enabling legislation. *Fasano* requires that a public hearing be provided where parties are given an opportunity to be heard, to present and rebut evidence, and to establish a right to a record and findings adequate to show that the ultimate decision is justified.[20] By establishing a process for hearing and deciding land-use cases, the court was able to review the record against the decision and evaluate whether there was a legitimate basis for making the decision.

In Oregon, zoning originally affected only cities, but in 1947 Oregon adopted enabling legislation that allowed counties to provide for comprehensive planning and zoning regulations.[21] Even before state law authorized planning and zoning of farm lands, agriculture in Oregon had always been a legislative concern.[22] In 1961, the Legislature adopted an agricultural tax-assessment deferral program whereby farmland zoned exclusively

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[18] Page v. City of Portland, 178 Or. 632, 165 P.2d 280 (1946); Smith v. County of Washington, 241 Or. 380, 406 P.2d 545 (1965); Roseta v. County of Washington, 254 Or. 161, 458 P.2d 405 (1969).

[19] 264 Or. 574, 507 P.2d 23 (1973).

[20] *Id.* at 587, 507 P.2d at 29-30. *See also* OR. REV. STAT. §§ 215.110(1), 215.055(1) and 197.763 (2005).

[21] Act of April 19, 1947, ch. 537 Or. Laws 948; Act of April 21, 1947, ch. 558 Or. Laws 1029.

[22] For example, ORS Chapter 610 established bounty laws, ORS Chapters 561.080 to 561.110 and ORS Chapters 566.210 to 566.260 established a system for agricultural education, and ORS Chapter 567 maintained stations for the pursuit of agricultural scientific activities.

for farm use and used for farm use can be taxed at its value for farm use instead of its market value for non-farm uses.[23] To implement the farm-tax deferral system statewide, the Legislature created the basic form of the "exclusive farm use" (EFU) zone in 1963.[24] To qualify for the special tax assessment, a farmer must put the land to farm use. Although the types of farm and non-farm uses and structures allowed on EFU lands have changed over time, the basic form of limiting non-farm structures and dwellings has remained unchanged.

In 1973, the Oregon Legislature adopted Senate Bill 100, the nation's first comprehensive statewide land-use planning program. Senate Bill 100 now appears as Oregon Revised Statute (ORS) chapter 197, which provides:

> The Legislative Assembly finds that:
>
> (1) Uncoordinated use of lands within this state threaten the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.[25]

Consistency in land-use decision making was achieved by creating an agency, the Land Conservation and Development Commission (LCDC), charged with adopting goals and guidelines to be used by local governments in preparing, amending, implementing, and enforcing their comprehensive plans.[26] To date, LCDC has adopted nineteen statewide planning goals.[27] Senate Bill 100 required all cities and counties to adopt comprehensive plans, which are reviewed by LCDC to ensure compliance with each of the land-use goals.[28]

Goal 3 requires that local governments preserve farmland based on uniform soil-quality standards. Goal 4 requires the conservation of forest lands based on suitability for commercial forest uses. Goal 5 requires that local governments inventory natural resources, open spaces, and historic resources, and allows the local government to decide whether to preserve a resource or

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[23] Ch. 695, 1961 Or. Laws.

[24] *Id.*; Ch. 577, 1963 Or. Laws.

[25] OR. REV. STAT. § 197.005(1) (2005).

[26] OR. REV. STAT. § 197.225 (2005).

[27] [Editor's Note: These planning goals, OAR 660-015-0000(1)-(14); 660-015-0005; 660-015-0010(1)-(4), can be accessed at Oregon Dep't of Land Conservation and Dev., Statewide Planning Goals, *available at* http://www.lcd.state.or.us/LCD/goals.shtml (last visited, Apr. 9, 2006).]

[28] OR. REV. STAT. § 197.175 (2005).

allow conflicting uses. Goal 10 requires that local governments inventory the existing land base available for housing, project future needs for residential lands, and then plan and zone adequately to meet those needs. Goal 11 requires that local governments determine how to efficiently provide public services, such as sewer and water, to a community (as opposed to responding haphazardly to development wherever it occurs). Goals 16 through 19 require that coastal shorelands, dunes, and estuary resources are preserved and protected.

Goal 9 requires that local governments make planning decisions that encourage economic development by projecting future business and industrial needs and providing an adequate supply of land to meet those needs. Oregon has made tremendous investments in infrastructure (such as providing adequate marine, air, and rail facilities) to serve specialized industries. As a result of Goal 9, industrial sanctuaries of varying sizes have been created throughout the state that are insulated from price-conversion pressures and other interfering uses, thereby protecting much of the "traded sector" employment base that, in turn, has the greatest economic multiplier for a community.[29] Further, by providing certainty that industrial lands are available, Goal 9 aids in recruiting and retaining business in Oregon.

Possibly the most important planning goal, and certainly one that is central to the issues pending before this Court, is Goal 14. Goal 14 requires that local governments adopt urban growth boundaries (UGBs) providing land for urban-area growth and separating urban uses from rural uses. Local governments determine the size and location of UGBs by forecasting population and employment growth for their city for a twenty-year planning period, then translating that data into the amount and location of land needed for housing, industry, and other urban uses. The purpose of Goal 14 is to "accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities."[30]

All of these provisions work together to prevent the "pig in the parlor" and the "glue factory next to city hall" scenarios. They also work to implement a shared vision for the future of a community. This is the measure of a quality land-use program. These provisions ensure that land suitable for farming, ranching,

[29] *See* OR. REV. STAT. § 285A.010(9) (2005).
[30] OR. ADMIN. R. 660-015-0000(14) (2006).

or forestry is preserved for that use, and that rural uses are separated from urban ones. They ensure an appropriate mix of housing and industrial uses. They require that development be served by adequate transportation, water, storm-water, and sewage infrastructure. They protect Oregon's natural and coastal resources. They provide for a vibrant and diverse economy. They are the basis of sound planning, and dictate that land-use regulations further the public welfare when balanced against the rights of the individual. They provide for citizen involvement in all phases of the planning process. They provide uniform land-use procedures whereby affected parties are entitled to participate in a hearing and in which decisions are based on written findings that may be challenged on appeal.

Oregon's land-use system has been a much admired national model for controlling growth, maintaining livability, and protecting farm land. Oregon's statewide planning program received the Outstanding Planning Award from the American Planning Association for its accomplishments, which include protecting over 15 million acres of farmland. The planning program has also received national recognition, including the 2000 Smart Growth – Sustainability Award from the American Planning Association, the 1999 Planning Landmark Award from the American Planning Association, the 1999 Ahwahnee Award of Honor from the Local Government Commission's Center for Livable Communities, the 1997 Livable City Center Award from Livable Oregon, Inc., the 1988 and 1989 State of the States Growth and Environment Awards from Renew America,[31] as well as support from the American Institute of Architects and the American Society of Landscape Architects. Thanks in large part to the planning program, Oregon communities are consistently recognized on national "best of" lists for livability; e.g., Portland was named one of the top ten "New American Dream Towns" by *Outside Magazine* in August 2005, and was recognized as the "Best Big City in the U.S." by *Money Magazine*.[32]

With that background, we now turn to how Measure 37 has impacted this rich tradition of community planning in Oregon.

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[31] *See* Oregon Dep't of Land Conservation and Dev., *supra* note 3.

[32] [Editor's Note: *See* Mike Grudowski, *The New American Dream Towns: Portland, Oregon*, OUTSIDE MAGAZINE, Aug. 2005 *available at* http://outside.away.com/outside/destinations/200508/best-american-towns-7.html (last visited Apr. 9, 2006); MONEY MAGAZINE (Dec. 2000).]

III

How Measure 37 has Affected Land Use Planning in Oregon: The Anti-Planning Principle

A. The Facts

Measure 37 has been in place for one year. As of the date the trial court found Measure 37 unconstitutional, the State of Oregon had received 1255 claims—1065 of which were directed to the Department of Land Conservation and Development (DLCD), the department charged with implementing LCDC's adopted goals and administrative rules. Of these claims, DLCD has issued 373 Final Orders.[33] About 90% of the final orders granted the requested relief in whole or in part—i.e., a waiver of the applicable state land-use regulations—and about 10% resulted in denials. The total amount claimed in public funds thus far under this measure totals over $2.2 billion; however, no "compensation" (in reality, requests for payments from public funds) has been granted because the measure failed to provide a funding source and the State is unable to pay claimants. It is estimated that the 1065 claims encompass over 66,000 acres of land, with over 75% of that land designated for exclusive farm use.[34]

A review of the Measure 37 claims to date finds that some seek approval for commercial uses incompatible with typical adjacent uses outside UGBs, such as farm, forest, or rural residential uses. Still other claimants seek aggregate mining uses, or expansion of such uses, or other industrial-type uses on resource-zoned land.[35] An overwhelming majority of these claims have come from western Oregon, with 65% of the claims coming from the Willamette Valley—including Clackamas, Multnomah, Washington and Yamhill Counties. These Willamette Valley counties contain the highest value farmland.[36]

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[33] App. A. Appendix A contains a Preliminary Draft Analysis of Measure 37 Claims Based on Unverified Data Submitted by Claimants compiled by Ron Eber, Farm and Forest Lands Specialist, from DLCD. This Court may take judicial notice of these facts pursuant to OEC 201(b) because the facts were compiled by DLCD, the agency charged with reviewing and issuing waivers pursuant to Measure 37, and their accuracy may be confirmed by consulting the DLCD website at http://www.lcd.state.or.us/LCD/measure37.shtm1#Final_Staff_Reports_and_Final_Orders.

[34] App. A.

[35] *See id.*

[36] *See* Or. Rev. Stat. § 215.710 (2005).

Contrary to the campaign promoting the passage of Measure 37, which highlighted elderly landowners unable to build a single-family house on their property for the benefit of family members, only 13% (134) of the 1065 claimants are seeking to build a single-family house on their land. By contrast, 86% of the claimants (919 claims) have requested land divisions—either subdivisions or partitions—and wish to site multiple dwellings, almost all on farm or forest land outside UGBs. The average yearly number of dwellings approved on EFU-zoned lands statewide between 1994 and 2003, before the adoption of Measure 37, was 683 per year. Although not a direct comparison, because a single Measure 37 waiver could allow more than one dwelling on EFU-zoned land, nearly twice as many development authorizations have been granted in ten months since the adoption of Measure 37.[37] These facts reveal that, despite the campaign's focus on regular folks unable to realize modest plans for their property, the real result of Measure 37 is a windfall for a select few land owners wishing to build large developments at the expense of surrounding communities.

B. How "Swiss Cheese Development" Impacts Sound Planning

As the map attached in Appendix B[38] illustrates, most of the Measure 37 claims filed are outside of, but in the vicinity of, the existing Portland Metropolitan UGB. Measure 37 completely undermines the ability of UGBs to perform the very objective for which they were created—to separate urban and rural uses, to accommodate urban population and urban employment inside UGBs, to ensure efficient use of land, and to provide for livable communities.

It will be difficult for any community to effectively plan and provide transportation and other services to areas where some lands have already been developed pursuant to Measure 37 claims because there will be no uniformity among developments in these areas. Granting waivers creates a form of non-conforming use. This task is made even more difficult because Measure 37 does not set a limit on when claimants must act on their

[37] App. A.

[38] The map attached in Appendix B locates Measure 37 claims in the state. It was created by DLCD and this Court may take judicial notice of it pursuant to OEC 201(b).

claims or even require disclosure of how they intend to use their property pursuant to such claims. For example, a claimant could receive a waiver and wait fifty years before acting pursuant to that authorization. By not setting any limitation as to when a claimant must develop pursuant to a claim, local governments will be forced to expend additional resources indefinitely tracking historical subdivisions or other land-use approvals granted through the Measure 37 process. Similarly, a claimant need not bring all claims at once. Measure 37 does not impose any limitation on how many times a claimant may return to seek additional compensation for existing regulations or regulations that may be imposed in the future.

Since only 13% of the Measure 37 claims submitted to date seek approval for a single house on farm or forest lands, it is apparent that a majority of Measure 37 applicants seek to develop medium to large-scale subdivisions, and the vast majority of these are in farm or forest areas outside UGBs. Because no urban planning has been done for the subdivisions sought by these rural-area claimants, the development of these subdivisions will almost certainly have a huge impact on public infrastructure services. Existing transportation, storm-water, and septic systems cannot be adequately planned and will likely not be adequate to serve the development allowed under these claims, as Measure 37 does not require that development be conditioned on having adequate infrastructure in place (or even planned) before being built.

The map in Appendix B aptly illustrates that the impact of Measure 37 is not generalized. Most of the claims come from the Willamette Valley and from near the existing UGBs. These are not cases in which claimants find it difficult, due to soil quality, to meet the farm-income standard necessary to locate a dwelling—as might be the case for claimants in eastern or southern Oregon where soil quality may not be as high. The location of the claims suggests that it is not planning principles, or even concerns about property rights, that guide these claimants, but rather the windfall they will realize by taking advantage of their proximity to the urban population if they are able to develop just outside the UGB.

Measure 37 is indeed the antithesis of good planning principles supported by the well accepted *Euclid* and *Kroner* cases. Measure 37 not only encourages incompatible uses between those

who have valid claims and those who do not, it provides no opportunity to ensure compatibility requirements for adjacent property owners. Thus, a claimant on property *A* could operate an aggregate mine. An adjacent claimant on property *B* could develop and sublease a commercial strip mall. Meanwhile, the owner of property *C*, who purchased his land subsequent to the statewide planning goals adopted in 1974, is prohibited all uses except farming. Unfortunately, farming property *C* may well be impractical or impossible because of the incompatible uses on properties *A* and *B*. There is no legitimate planning principle served by allowing the owners of properties *A* and *B* to develop regardless of the impact on surrounding properties. The measure further exacerbates bad planning because it causes a domino effect—in the above example, once *A* takes advantage of regulation-free development, *B*—who may have been eligible but preferred not to file a claim—may be compelled to file in order to cut losses and sell to the highest bidder before the aggregate mine goes in next door. This leaves *C* on devalued property, without recourse and surrounded by incompatible and inappropriate land uses.

By contrast, the exception process established under Goal 2 provides an effective relief valve for a property owner with justifiable circumstances if one of the statewide planning goals cannot be met. However, even this process now will be distorted because of the effects of Measure 37. One of these exceptions, the "committed exception," allows development on land that would otherwise be zoned for a resource use (e.g., farming or forestry) when that land is "irrevocably committed" to a non-resource use.[39] Thus, where successful Measure 37 claimants have committed their lands to non-resource use, neighboring landowners can also claim a right to develop under the committed exception, with the effect of increasing the amount of land eligible for development pursuant to the committed-lands exception process. All of these examples illustrate that there is no rational connection between land use and ownership dates.

C. The Vagaries of Determining Reduction in Value

A valid Measure 37 claim requires a demonstration that the land-use regulation at issue has the effect of reducing the fair

[39] OR. ADMIN. R. 660-004-0020 (2006).

market value of the property. But whether a regulation or a series of regulations has changed the value of a particular property should not be determined in a vacuum. A fair computation of the reduction in fair market value would compare the value of the subject property before and after application or enactment of all of the regulations to all properties similarly situated. Put differently, a fairly calculated reduction in fair market value caused by a land-use regulation should not equal the increase in value that results if the subject property alone is exempted from regulation while the surrounding properties continue to be regulated.

> It might be the reason that your hundred-acre farm on a pristine hillside is worth millions to a developer is that it's on a pristine hillside: if everyone on that hillside could subdivide, and sell out to Target and Wal-Mart, then nobody's plot would be worth millions anymore.[40]

The calculation required by Measure 37 to determine the value of "just compensation" is not based on actual loss (if any) from the enactment of the land-use regulation, but rather the value of the subject property in isolation today, as if it were exempt from certain land-use regulations and no other property was similarly exempt. This monopoly effectively grants Measure 37 claimants a windfall.

Consider the following hypothetical. In 1950, Smith purchases a 100-acre orchard. In 1975, the land and surrounding properties are zoned EFU under Goal 3 of the statewide land-use planning goals. If Smith could build a 100-lot subdivision in 2005, he could sell the parcel for $5 million. If we assume that the current value of the property as an orchard is $1 million, how much did Smith lose? $4 million? No. While $4 million is the amount a "just compensation" claim under Measure 37 would yield, that $4 million really represents the value of an individual exemption from the regulation. This is because the $4 million figure assumes all other surrounding property owners must continue to abide by the regulation. As the result of the application of the EFU zoning to neighboring properties, the supply of developable land continues to be constrained, increasing the price of unregulated or developable land.[41] In this hypothetical, the EFU regulation

[40] Malcolm Gladwell, *The Vanishing,* THE NEW YORKER, Jan. 3, 2005, at 72.

[41] Numerous other factors, including population growth and public infrastructure investments, may also have affected property values. Indeed, the amenities created by a comprehensive planning scheme may be responsible for some portion of the

also may have increased the property's development value by protecting amenities such as the pastoral setting.[42] Therefore, the value of a property today as if it were unregulated is not an indicator of the actual loss in value caused by the enactment and application of a regulation,[43] but rather reflects windfall benefits to Measure 37 claimants that far exceed any actual reduction in fair market value.

In short, the extent of the retroactivity and the monopoly effect of Measure 37 combine to grant property owners an undeserved and erroneously calculated windfall. Under Measure 37, claimants are not paid what they have lost (if anything) from the enactment of a land-use regulation; instead claimants receive an amount that reflects an exemption from land-use regulations granted to them alone, assuming that land-use regulations continue to apply to surrounding properties.

The circuit court correctly concluded that the remedy for an otherwise-eligible Measure 37 claim that can show a loss of property value is disproportionate to the stated purpose of Measure 37 to provide for "just compensation." For example, there is no requirement for a "present value" calculation to properly judge the value in today's dollars versus the "just compensation" owed the owner of property that may date to, say, 1952 when the land-use regulation was first enacted.

Furthermore, the State of Oregon has foregone a great deal of potential revenue through the farm and forest tax-deferral program in recognition of the limitations on the uses of rural land.[44] Measure 37 does not require reimbursement of past-deferred taxes or use of this benefit to offset the alleged loss of value resulting from the land-use regulations. The total amount of

population growth. Further, if the supply of unregulated or developable land were to increase, one would assume that the value of properties would decline. If the market currently has a demand for ten such subdivisions, and Smith's property is the only one available, it might be worth a premium. But if 100 properties are available, the value would be just enough to get ten property owners to sell. Furthermore, if Smith's property is not one of the properties selected by the developers (e.g., because there is no demand), then it may well be argued that the regulation had no impact on Smith's property value.

[42] Likewise, in a residential zone, the residential setting unmarred by convenience stores or garbage dumps would be protected.

[43] Nor does that value reflect the opportunity cost or interest due.

[44] OR. REV. STAT. § 215.243(4) (2005). *See generally* Edward J. Sullivan, *The Greening of the Taxpayer: The Relationship of Farm Zone Taxation in Oregon to Land Use,* 9 WILLAMETTE L. REV. 1 (1973).

money that has remained in farmers' pockets as a result of what Appellants characterize as an onerous and overly regulatory land-use system totals $5.4 billion in property tax relief.[45] Thus, owners of farm or forest land are compensated each year for the regulations that restrict their property through the deferral of taxes that would otherwise be due.

D. Impacts on the Planning Process

The likelihood of error by local planners or other government officials is significantly increased as a result of Measure 37 because of the number and effect of potentially applicable regulations. A valid Measure 37 claim requires a showing that the property was owned before the applicable regulations took effect. To support such inquiries, a local government must compile, maintain, and make available a database of all of its land-use regulations and amendments thereto. Rather than applying the plan and regulations uniformly to each property, a planner or other government official is required to analyze, and in many cases guess, about whether applying or implementing a regulation will give rise to a potential claim. Land-use planning means little if planning staff is unable to provide the public with reliable and credible information about which regulations apply. This credibility is undermined by Measure 37.

Moreover, requiring local planners to determine when a person became the "present owner" of property effectively requires them to develop a working knowledge of real-estate and estate-planning law. An interest in property can be created by a large number of real-estate and estate-planning documents, such as co-tenancy arrangements or trusts, all of which must be evaluated by the planning staff to determine when the claimant became the legal owner of the property. The likelihood of error is high, and the credibility of planning staff and the planning program are further undermined.

It is possible that the enduring damage to Oregon's land use program, however, will not be the individual claims that may be brought, the money that could be paid, or even the exemptions that might be granted. Rather, the longer-lasting damage lies in the unwillingness of state or local governments to amend their plans in order to respond to new and changing conditions, since

[45] *No Double Tax*, REGISTER-GUARD, Nov. 9, 2004.

adopting new regulations would likely be the source of future Measure 37 claims. If local governments are unwilling to periodically review their plans, including inventories of housing, commercial, and industrial lands, planning sclerosis will set in. Local plans and regulations will become effectively "frozen" and, over time, of no use in guiding development consistent with a community's vision. Ultimately, what was once a land-use system worthy of emulation will become a detriment to the citizens of the state.

E. Impacts to Neighbors and the Community.

Goal 1 calls for citizen involvement in all "phases of the planning process." Measure 37 does not contain any requirement that a local government provide notice of potential claims to affected parties; nor does it require any public hearing before a waiver is granted. A local government may issue a waiver without making any written findings supporting the decision or creating a record showing that the claimant qualifies for relief. Further, Measure 37 does not provide for, require, or allow the local government to consider how granting a waiver might directly harm a neighboring property owner or the greater community. This approach is not only contrary to the procedural due-process guarantees of the Fourteenth Amendment of the U.S. Constitution, it is contrary to the quasi-judicial hearing requirements set out in ORS 197—such as notice, a hearing, and findings supporting a decision—that this Court held essential when local governments make quasi-judicial land-use decisions. This is contrary to the holding of the *Fasano* decision, which is based on due-process principles.[46]

Measure 37 is the antithesis of the sound planning principles that underpin Oregon's existing land-use system. Measure 37 prioritizes the individual's right to a particular return on private property over the public good. It undermines a local government's ability to plan for its future development and growth. It sacrifices valuable resource lands. It fails to require an open public participation process. Generally, when two statutes are in conflict, a court must, whenever possible, construe them together

[46] *See also* Mallatt v. Luihn, 206 Or. 678, 294 P.2d 871 (1956); West v. City of Astoria, 18 Or. App. 212, 524 P.2d 1216 (1974) (due process requirements are usually held to be satisfied if a hearing is given either by the agency or by the reviewing court at any time before the governmental action becomes final).

and in such a manner as to be consistent, rather than in conflict, thus giving effect to both statutes.[47] Measure 37 takes an eighty-one-year history of zoning and planning in Oregon, including the most recent thirty-year period under the statewide planning system established in 1973, and turns it on its head. As it is currently enacted, Measure 37 and the existing Oregon land-use system are inherently incompatible, and no change in meaning or application can make them compatible.

IV

Reforming the Planning Process

Because Measure 37 is incompatible with the existing Oregon land-use system, the measure is an inappropriate means of remedying any of its perceived problems. As our society becomes more populous, with more people living relatively close together, land-use regulations are essential, not only to provide predictability and stabilize property values, but also to plan for future growth and to prevent incompatible land uses.[48] Such regulations are a civilizing agreement amongst citizens that allow us to live in harmony. Measure 37's patchwork approach of addressing individual grievances regardless of the impact on the community is at odds with this civil contract and is certain to leave aggrieved neighbors in its wake. The measure does not reform or improve the planning system; it completely sidesteps it, failing to negotiate the tension between private property and regulation for the public good.

As has been illustrated, Measure 37 creates a new class of winners and losers based on the accident of ownership that cannot be found in any primer on planning principles and that is not grounded in Oregon land-use law. Likewise, the idea that a property owner should be allowed to develop property without regard to the laws that his neighbors must obey, and regardless of the effects on his neighbors and neighboring properties, is a radical departure from the system now in place in which neighbors

[47] Or. Rev. Stat. § 174.010 (2005); Sanders v. Or. Pac. State Ins. Co., 314 Or. 521, 527, 840 P.2d 87, 90 (1992); McLain v. Lafferty, 257 Or. 553, 558, 480 P.2d 430, 432 (1971).

[48] Oregon's population is expected to increase by 1.5 million by 2030. *See* Office of Econ. Analysis Demographic Forecast, *State and County Population Forecasts and Components of Change, 2000 to 2040*, http://www.oea.das.state.or.us/DAS/OEA/demographic.shtml#Short_term_State_Forecast (last visited Apr. 9, 2006).

are entitled to notice and allowed to voice their concerns. The economic benefit to this new class is disproportionate to the purported remedy offered by Measure 37.

By contrast, Senate Bill 82[49] (also known as the "Big Look"), enacted during the most recent legislative session, is the appropriate mechanism to address any inadequacies and propose any necessary reforms to the land-use planning system. In passing Senate Bill 82, the Legislature recognized the inherent conflicts between private property and the need for land-use regulations and appropriately acted to support a (re)evaluation of the land-use program that would strike a balance between the two.

Senate Bill 82, also known as the "Big Look," created a ten-member task force, knowledgeable about the land-use system and the economic context within which it operates, to comprehensively examine the statewide planning system and evaluate reforms to it. Specifically, the task force will study and make recommendations concerning (1) the effectiveness of the land-use planning system in meeting the current and future needs of all Oregonians, (2) the roles and responsibilities of state and local governments in land-use planning, and (3) land-use issues specific to properties inside and outside of UGBs and the interface between those properties. In keeping with the existing land-use system, Senate Bill 82, unlike Measure 37, provides for significant citizen involvement, requiring public meetings and citizen surveys. The task force is charged with generating a preliminary, progress, and final report detailing its findings and recommendations over the next two biennia.

The review process under Senate Bill 82 presents an opportunity for creating a renewed vision for Oregon's future physical-development patterns that directly incorporates economic, environmental, and community perspectives. It has the opportunity to make the land-use planning process even more responsive to the needs of Oregon's citizens, and to identify ways in which the geographic, environmental, and economic needs of the state's various regions should be differentiated. Moreover, it will be accomplished by extensive local, regional, and statewide conversations and outreach to identify Oregonians' common values and determine how best to preserve and implement them. This review process is consistent with a study conducted five

[49] Act of Aug. 9, 2005, ch. 703, 2005 Or. Laws.

years ago by a committee of the Oregon Chapter of the American Planning Association (the "COPE Report") which found a significant majority of Oregonians support land-use planning.[50] The findings of the COPE Report were recently confirmed by a study conducted by CFM Research for the Oregon Business Association and the Institute of Metropolitan Studies at Portland State University's Nohad A. Toulan School of Urban Studies and Planning. The study, completed earlier this year, found that 64% of Oregonians want to protect farmland for farming, 61% want to protect the environment, and 58% want to protect wildlife habitat. Furthermore, 70% tied growth management to livability and want land-use decisions based on planning rather than market-based decisions.

Finally, while signing Senate Bill 82 into law, Governor Kulongoski stated, "I am a proponent of our state land use system. I believe the values and goals that were established in 1973 remain the same in 2005. . . . [I]t is time to reconnect *all* Oregonians to *their* land use system."[51] If Measure 37 is found valid, Oregonians, the majority of whom support land-use planning, will never have that opportunity. Measure 37 not only threatens to eviscerate Oregon's land-use planning system, it also effectively renders Senate Bill 82 moot, as there will be no meaningful way to evaluate and develop a strategic plan for future growth or implement land-use regulations alongside Measure 37. By planning through an established and public legislative process such as Senate Bill 82 contemplates, communities are able to express their visions for themselves. Democracy and the public trust are ill-served by allowing land-use decisions based on ownership rather than public policy.

Measure 37 is not only unfair to existing property owners who are ineligible to make a claim, it is unfair to the future generations who do not yet own property but for whom we are planning

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[50] [Editor's Note: The November 2001 report, *An Evaluation of Planning in Oregon, 1973-2001*, was submitted to the Oregon Chapter of the American Planning Association by the Committee on the Oregon Planning Experience (COPE). It is available at http://www.wou.edu/~khes/geog425/cope.pdf#search='Oregon%20Chapter%20of%20the%20American%20Planning%20Association%20and%20An%20Evaluation%20of%20Planning%20In%20Oregon,%2019732001' (last visited Apr. 12, 2006).]

[51] [Editor's Note: *See* Oregon Dep't of Land Conservation and Dev., Governor Kulongoski's Speech on Senate Bill 82, *available at* http://www.lcd.state.or.us/LCD/30_year_review.shtml#Governor_Kulongoski_s_Speech_on_Senate_Bill_82 (last visited Apr. 9, 2006) (emphasis in original).]

the future. Measure 37 is about immediate gratification at the expense of neighbors and future residents of Oregon, many of whom are not yet born.

V

CONCLUSION

In the *Euclid* and *Kroner* decisions quoted at the outset of this brief, the Oregon Supreme Court and U.S. Supreme Court noted that a zoning scheme is valid if its purpose is fairly debatable and not purely arbitrary. Oregon's current system of zoning land based on its suitability for the particular uses chosen by the community outlines a rational system based on legitimate objectives. Under the Senate Bill 100 land-use scheme, there is a rational connection between the land and the uses allowed on the land. For example, if property is suitable for farming, it cannot be used for shopping malls; if it is suitable for timber production, it cannot be used for tract homes. Measure 37, by contrast, establishes an irrational system based solely on timing of ownership. The uses allowed on a particular parcel are entirely random, with all benefits and rights running to the claimant rather than the public. The public is left to suffer without the benefit of consistent application of land-use regulations and without protection from the direct impacts of waivers.

For the reasons set forth above, policy and law dictate that the circuit court's decision holding Measure 37 unconstitutional be affirmed.

APPENDIX A

December 12, 2005

TO: Lane Shetterly, Director

FROM: Ronald Eber, Farm and Forest Lands Specialist

RE: Preliminary Draft Analysis of M 37 Claims Based on Unverified Data Submitted by Claimants

Here is the analysis I prepared for the Oregon Water Resources Congress held on November 30, 2005 which we discussed previously. It is based on the unverified information in our data base as submitted by the claimants on our spread sheet that we use for our initial sorting of the M 37 claims.

As of 10/25/05

1255 claims filed with the state (not all have been distributed)

1065 have been sent to DLCD

373 final orders and reports prepared
[No compensation awarded - (90% waivers, 10% denials)]

75 draft reports pending

30 claims withdrawn

The 1065 claims request at least $2.2 billion in compensation and cover at least 66,000 acres of land

Percent of Claims by Zoning

EFU	75%	
Forest	12%	
Mixed Farm/Forest	+2%	
	89%	Resource Land
Rural Residential	10%	
Other	1%	

26,341 notices to neighbors of claimants sent
2500 comment letters received

20 court cases filed challenging claim decisions

18 by claimants
2 by neighbors of claimants

4 other pending court cases

One constitutional case (MacPhearson)
Two by counties (Jackson and Crook) addressing transferability and local ability to waive state law, and
One regarding whether the Columbia Gorge Plan is exempt from M 37

Regional Distribution of Claims

Western Oregon	85%	
Eastern Oregon	15%	
Willamette Valley	65%	
North		47% (Clackamas, Multnomah, Washington, Yamhill)
Central		13% (Marion, Polk, Benton)
Southern		5% (Lane and Linn)
Coast	6%	
Southern	11% (Douglas, Josephine, Jackson, Klamath)	
Central	7% (Deschutes, Crook, Jefferson)	
Far East	5% (Baker, Grant, Malheur, Umatilla, Union, Wallowa)	
Columbia Co.	2%	
Hood River/Wasco	3%	
Cities	1%	
	100%	

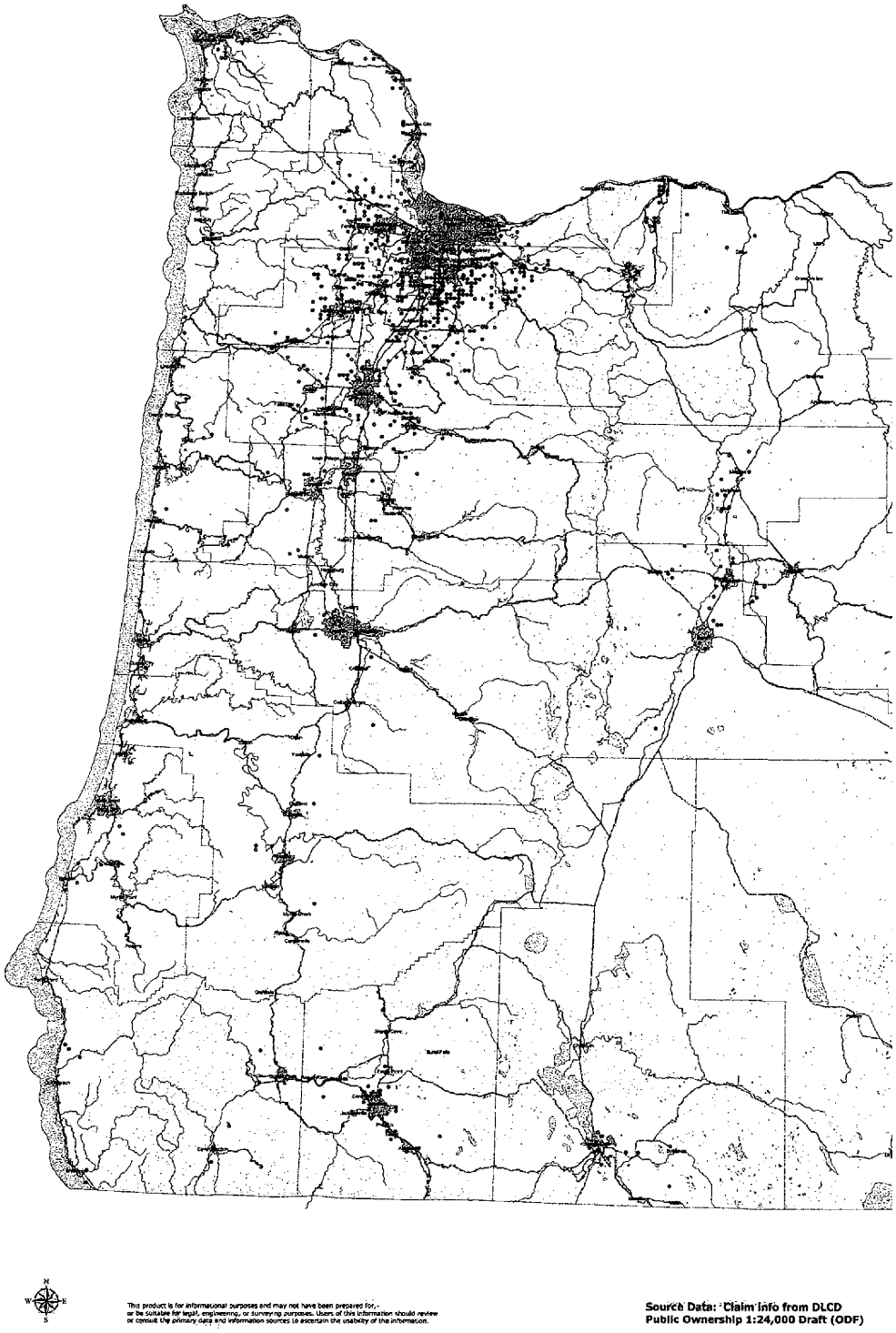
Land Use Requested by Claimant

Land Division & dwellings)	86%	(919 claims)
Dwelling	13%	(134 claims)
Other Use (aggregate, commercial, industrial)	1%	(12 claims)

10 year average of new dwellings in EFU zones (683 per year)

Appendix B

STATE OF OREGON MEASURE 37 CLAIMS FILED WITH THE STATE
APPENDIX B



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