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Gone Too Far: Measure 37 and the Perils of Over-Regulating Land Use

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Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use

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INTRODUCTION

Planners and environmentalists have long lauded Oregon's unique system of regulating land use.¹ For over thirty years, the system had two primary actors: the legislature, which passed regulations, and the courts, which enforced them. Legislators and judges worked together to establish laws that preserved the state's natural environment, promoted smart-growth principles, and improved urban centers.

While many Oregonians were happy with the laws' results, they became disillusioned with the state's means of achieving them. In November 2004, Oregonians asserted themselves as a powerful third actor in the land use debate. During the election that month, the citizen-sponsored Measure 37 appeared on the Oregon ballot. The measure was officially titled: "Governments must pay owners, or forgo enforcement, when certain land-use restrictions reduce property value."² It required that local governments either monetarily compensate landowners whose properties fall in value as a result of land use regulations or, under certain conditions, exempt those landowners from the regulations altogether.³ Going further than any other state law, Oregon's Measure 37 presented a radical remedy for landowners by preventing the state from engaging in "regulatory takings" without compensating landowners.⁴

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1. See, e.g., Gary C. Bryner, *Carbon Markets: Reducing Greenhouse Gas Emissions Through Emissions Trading*, 17 TUL. ENVTL. L.J. 267, 277-78 (2004) (describing Oregon's innovative carbon dioxide standard and greenhouse gas emissions reduction programs); Edward J. Sullivan, Norman Williams, Jr. & Bernard H. Siegan, *The Oregon Example: A Prospect for the Nation*, 14 ENVTL. L. 843, 851 (1984) (symposium panel discussion, remarks of Norman Williams, Jr.) (applauding Oregon's "combination of favorable features [as] extraordinary"); Rob Bennett, *The Next Big Thing in Green Building*, NW. CONSTRUCTION, Oct. 2004, at 33 (arguing that Portland's "[t]hirty years of progressive land use and environmental planning, recycling, alternative transportation investment, and urban renewal is paying off").

2. OREGON VOTERS' PAMPHLET: STATE MEASURES 103-04 (2004), available at <http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf> (last visited Mar. 28, 2005).

3. *Id.* at 103. Note that this Comment uses "local government" to collectively refer to local governments, special districts, or state agencies that propagate land use regulations.

4. The formulation is radical because, though at least four other states have enacted compensation

Voters supported Measure 37 by a margin of three to two.⁵ Their sentiments echoed the Supreme Court's formulation of regulatory taking doctrine in *Pennsylvania Coal Co. v. Mahon*: "[W]hile property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking."⁶ At its core, Measure 37 addressed Oregon voters' concern that—for all the good the land use system had done—the government had "gone too far" in prohibiting landowners from using their land as they saw fit.

This Comment examines why Oregon voters took the dramatic step of passing Measure 37, despite longstanding support for the state's strong approach to growth control. Although economic and demographic shifts may have been partly responsible, this Comment argues that the answer is more straightforward and far less inevitable: the legislature and the courts stopped listening to the people of Oregon.

I. HOW THE LEGISLATURE AND THE COURTS WENT TOO FAR

Oregon's two-actor system did little to protect landowners from regulatory takings. The legislature set up one of the most far-reaching land use systems of any state and added more regulations each legislative session, yet failed to give landowners the opportunity to meaningfully challenge the regime in court. The courts, working within the legislature's system, rarely limited the legislature's power, and their inconsistent regulatory takings analysis frustrated landowners. Moreover, prior to the introduction of Measure 37, the courts struck down another ballot measure involving regulatory takings. The actions of both the legislature and the courts furthered the perception that they thwarted the public will.

A. *The First Actor: The Legislature Establishes a Far-Reaching Land Use System*

1. *Oregon's Land Use System*

Oregon's modern land use regime began in 1973, when the legislature

statutes, none goes as far as Measure 37. *See* FLA. STAT. ANN. ch. 70.001 (Harrison 2000) (requiring the government to compensate for losses that "inordinately burden" property use); LA. REV. STAT. ANN. §§ 3:3601-3602 (West Supp. 2003) (requiring the government to compensate for losses in value of twenty percent or more); MISS. CODE ANN. §§ 49-33-1 to -19 (1999) (requiring the government to compensate for losses in value of forty percent or more); TEX. GOV'T CODE ANN. §§ 2007.002(5)(b)(2), .024 (Vernon 2000) (requiring the government to compensate for losses in value of twenty-five percent or more or to invalidate the action).

5. *See* Elections Div., Office of the Sec'y of State (Or.), November 2, 2004, General Election Abstract of Votes: State Measure 37, at <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf> (last visited Mar. 9, 2005) (showing that 1,054,589 voted for and 685,079 voted against the measure).

6. 260 U.S. 393, 415 (1922) (emphasis added).

Oregon's Measure 37

passed SB 100.⁷ The legislation mandated that each city, county, and regional agency with planning authority draft, adopt, and enforce comprehensive land use plans.⁸ These comprehensive plans must include both a land use map and a policy statement and must address, at a minimum, “sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs.”⁹ Oregon’s top-down approach is unique even among the states that have required or encouraged their local governments to adopt comprehensive plans.¹⁰

SB 100 also required that local governments’ comprehensive plans conform with statewide planning goals (Goals) that have been approved by a governor-appointed, permanent statewide agency, the Land Conservation and Development Commission (LCDC).¹¹ The Goals, which now number nineteen, include citizenship participation, protection of farm lands, development of urban growth boundaries, conservation of natural resources, and a diversified economy.¹² The LCDC also reviews local governments’ comprehensive plans both initially and on an ongoing basis to determine whether they comply with the Goals.¹³ When the LCDC approves a local government’s comprehensive plan, it is officially “acknowledging” that the plan complies with the Goals.¹⁴

This process of acknowledgement is critical to the review of challenged land use decisions.¹⁵ In Oregon, the primary body that conducts such reviews is

7. S.B. 100, 1973 Or. Laws 127.

8. OR. REV. STAT. § 197.175(2) (2003).

9. § 197.015(5).

10. See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 67-76 (2d ed. 2000) (noting that while some authorities claim half the states compel local governments to use comprehensive plans, classifying the pertinent state statutes is difficult). Oregon’s “plan-as-law” approach places it among a handful of states, including Florida and Arizona, in which comprehensive plans achieve dispositive significance with respect to land use regulations and legal actions. See Edward J. Sullivan, *Comprehensive Planning*, 36 URB. LAW. 541, 541 (2004) (noting also that the plan-as-law approach “elevate[s] the plan to the status of an ‘impermanent constitution,’ in which the plan is the measure of land use regulations and actions”); see also Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement, and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 3, 54 (2005) (arguing that “the vast majority of states do not currently require [as Oregon does] local governments to adopt comprehensive plans or give such plans binding legal force”).

11. See §§ 197.075, .175-.251(5).

12. See Oregon Dep’t of Land Conservation and Dev., *Goals: Overview of Goals*, at <http://egov.oregon.gov/LCD/goals.shtml> (last visited Mar. 9, 2005); see also Robert Liberty, *Planned Growth: The Oregon Model*, 13 NAT. RESOURCES & ENV’T 315 (1998) (describing the Goals’ evolution).

13. See § 197.175(2)(a) (stating that each local government must “[p]repare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission”). As the Goals change, local governments must revise and resubmit their planning efforts. See § 197.646.

14. § 197.015(1) (“‘Acknowledgment’ means a commission [LCDC] order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with the goals.”); see § 197.251 (outlining the process by which LCDC reviews acknowledgment decisions).

15. There are two definitions of “land use decision” in Oregon. The first is statutory. See § 197.015(10) (defining “land use decision” to mean “(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) The

the Land Use Board of Appeals (LUBA), a quasi-judicial administrative panel that was established by the legislature in 1979 and is unique among the states.¹⁶ Before LUBA, Oregon allowed parties to seek review of local land use decisions in a variety of ways: through writ of review to other circuit courts, declaratory judgment, or a petition for review to the LCDC. Now, LUBA has “exclusive jurisdiction to review any land use decision”¹⁷ and only state appellate courts can review its decisions.¹⁸

When ruling on a challenged land use decision, LUBA first determines whether a comprehensive plan has been acknowledged by the LCDC. If the LCDC has not acknowledged the plan, LUBA determines whether the land use regulation complies with the Goals.¹⁹ However, if LCDC has acknowledged the plan, then LUBA reviews any land use regulation in the same jurisdiction for compliance with that plan. Acknowledgment thus establishes the local government’s comprehensive plan as the legal standard in land use disputes, rather than a statewide baseline or a judge-devised standard. In this way, the state legislature has allowed local governments to play a substantial role in both the regulatory and judicial components of the land use system. Because this arrangement appears, to the public, to give great deference to local governments and their comprehensive plans, it has negatively influenced public perception of how the courts enforce land use laws.²⁰

Oregon’s land use law has not been static since the passage of SB 100.²¹ The legislature’s “inclination has been to add to, rather than revise, the existing planning legislation.”²² Over time, additional legislation created a liaison

goals; (ii) A comprehensive plan provision; (iii) A land use regulation; or (iv) A new land use regulation; (B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals; or (C) [certain decisions of county planning commissions]). The second is court-defined. *See, e.g., Billington v. Polk County*, 703 P.2d 232, 235 (Or. 1985) (stating that a land use decision must have “a significant impact on present or future land use in the area”). A special type of land use decision, also reviewable by the Land Use Board of Appeals, is a “limited land use decision.” *See* §§ 197.015(12), .825(1).

16. *See* § 197.810(1) (creating the three-member, governor-appointed LUBA). There is no similar quasi-judicial administrative panel in other states, though the Florida Chapter of the American Planning Association chapter has proposed a Land Use Board of Appeals based on the Oregon model. *See* Fla. Chapter of the Am. Planning Ass’n, Proposal for a Florida Land Use Board of Appeals, at http://www.floridapanning.org/legislative/white_papers/LUBA%20description%2010-3-2003.doc (adopted Oct. 3, 2003).

17. § 197.825.

18. § 197.850(3)(a). *See generally* §§ 197.805-.850 (establishing LUBA’s procedures, duties, and authority).

19. *See* *Foland v. Jackson County*, 807 P.2d 801, 803 (Or. 1991) (establishing that “a land use decision made in compliance with an acknowledged plan is *ipso facto* in compliance with the goals”).

20. *See infra* Section I.B.

21. *But cf.* Hong N. Huynh, Comment, *Administrative Forces in Oregon’s Land Use Planning and Washington’s Growth Management*, 12 J. ENVTL. L. & LITIG. 115, 149 (1997) (arguing that by the 1990s, Oregon had “obtain[ed] some stability and respect in land use planning and growth management”).

22. Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 819 (1998); *see also* *Neuberger v. City of Portland*, 603

Oregon's Measure 37

committee between the LCDC and local governments, set new standards for housing, defined LUBA's reach, provided for review of regional planning efforts, and established priorities for urban growth boundaries.²³ Last session, a public interest group with thirty years experience in the land use field monitored a record 240 bills related to land use.²⁴

2. A Failure to Protect Landowners with Judicial Remedies

Citizens might have accepted the elaborate and ever-changing land use laws if they had reliable access to remedies for the laws' negative effects. The legislature, however, thwarted citizens' ability to seek such remedies. The legislature erected at least three "significant deterrents to full and effective citizen participation":²⁵ the reliance on evidence presented below, strict rules on standing, and the requirement that losing parties pay attorneys' fees. Under these restrictive rules, and despite a complex regulatory scheme, LUBA issues only about 180 opinions a year.²⁶

(a) Review of Record Below

Unlike traditional courts, LUBA does not usually hear new evidence.²⁷ Rather, it relies primarily on the record created below, and specifically on local government hearings for public comment on a proposed land use decision.²⁸ The legislature has limited LUBA's powers of review, with a few exceptions, to the issues presented at these evidentiary hearings.²⁹ If an issue is not

P.2d 771, 778 (Or. 1979) (observing that "[s]ince 1973, every session of the legislature has produced significant legislation dealing with local planning").

23. See § 197.165 (establishing the liaison committee, passed in 1977); §§ 197.295-.314, .475-.490 (setting new standards for housing, passed between 1981 and 1987); § 197.195 (expanding the reach of LUBA, passed in 1991); § 197.274 (mandating that the framework plans of a governing body for the Portland region be subject to review, passed in 1993); § 197.298 (stipulating what kind of land may be included in an urban growth boundary, passed in 1995).

24. See 1000 Friends of Oregon, *Land Use Planning Survives Legislative Session*, at <http://www.friends.org/issues/2003bills/summary2003.htm> (last visited Mar. 9, 2005).

25. Sullivan, *supra* note 22, at 837.

26. Author's calculation is based on the number of opinions issued by LUBA in 2002, 2003, and 2004. See Land Use Board of Appeals, LUBA Opinions and Orders by Year, at <http://luba.state.or.us/opinions.htm> (last visited Mar. 9, 2005). *But cf.* 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, 447 & 447 n.46 (2000) (stating "[o]n average, LUBA considers about 250 case filings per year, of which approximately two-thirds reach the opinion stage"—which would result in about 166 cases per year).

27. § 197.835(2)(b) (confining LUBA review to the record below, including "any finding of fact of the local government, special district, or state agency for which there is substantial evidence in the whole record" except in disputes over procedural irregularities such as standing or unconstitutionality of the decision).

28. *Id.* In limited circumstances, there may be multiple hearings, see § 197.763, an evidentiary hearing may not occur, see § 197.830(3)-(4), or petitioner may raise new issues in a LUBA hearing, see § 197.835(4).

29. See § 197.835(3); see also § 197.763(1) ("An issue which may be the basis for an appeal to the

presented at an evidentiary hearing, it may only rarely be litigated in a suit challenging a land use decision.

(b) Standing

The second obstacle, related to the first and even more striking, is that only a citizen who “appeared,” orally or in writing, before the local government at the evidentiary hearing may appeal a land use decision.³⁰ A landowner’s ability to gain standing on a land use claim, as well as the issues that may be addressed in his suit, thus depends heavily on his participation at the first stages of litigation. However, Oregon’s feeble laws on required notice impede citizens’ ability to meet the appearance requirement for standing. Local governments may give notice of the evidentiary hearing as late as twenty days before it takes place, providing potential litigants only a very short time to review the issues and prepare to appear.³¹ Further, the law only requires local governments to notify landowners whose property is within one hundred or five hundred feet of the property (depending on zoning type) involved in the land use decision.³² Both rules disadvantage landowners.

(c) Attorney’s Fees

Oregon law creates a third obstacle to landowners challenging regulation: If a court finds that losing landowners did not have probable cause to believe that their position was well-founded in the law or in the facts, the landowners must pay the local government’s attorney’s fees.³³ This rule may deter frivolous suits and add to LUBA’s much-touted efficiency.³⁴ However, the rule likely deters worthy claimants from appealing land use decisions.

B. *The Second Actor: The Courts Further Frustrate Oregonians*

Even if landowners believe their claims are worth litigating, courts’ inconsistent and harsh application of relevant law deters landowners from seeking relief. Oregon courts have developed a unique method of disposing of regulatory takings cases, specifically frustrating voters in three ways: first, by

Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government.”).

30. § 197.830(2)(b).

31. § 197.763(3)(f)(A).

32. § 197.763(2)(a)(A)-(C).

33. § 197.830(15). See *Fetchig v. City of Albany*, 946 P.2d 280, 283 (Or. App. 1997) (stating that attorneys’ fees would be awarded under the probable cause prong if “no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit”).

34. See Sullivan, *supra* note 26, at 499-501; Sullivan, Williams & Siegan, *supra* note 1, at 845 (symposium panel discussion, remarks of Edward J. Sullivan).

Oregon's Measure 37

deferring to land use regulations; second, by applying takings analysis inconsistently; and third, by striking down a ballot initiative addressing regulatory takings in 2000.

1. Deference to Land Use Regulations

First, in accordance with the acknowledgement process, state courts generally defer to land-use regulations that are consistent with local comprehensive plans.³⁵ Before the legislature enacted SB 100, the Oregon Supreme Court held that government officials' decisions relating to comprehensive plans were "quasi-judicial" and did not merit deferential review.³⁶ After the passage of SB 100 and the resulting increase of legislative activity in the land use context, however, Oregon courts held that officials' decisions were legislative and thus due judicial deference.³⁷ Courts settled on this deferential approach at precisely the time when landowners required greater—not less—protection from excessive regulation. The newer standard, which favors local governments, has undercut landowners' ability to challenge land use decisions.

2. Inconsistent Takings Analysis

Oregon courts also apply takings analysis inconsistently, leaving landowners uncertain about the legal landscape. Under federal constitutional law, a typical land-use regulation does not constitute a taking,³⁸ but in certain circumstances, a regulation may go so far in regulating property that it will be recognized as a taking.³⁹ The Supreme Court has never precisely defined this standard.⁴⁰ However, in *Penn Central Transportation Co. v. City of New York*, the Court laid out a three-factor balancing test, weighing the character of the challenged regulation, the economic impact of the regulation on the landowner, and the nature and extent of the regulation's interference with landowners'

35. See *supra* text accompanying notes 14-20.

36. *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23, 29-30 (Or. 1973).

37. See *Neuberger v. City of Portland*, 603 P.2d 771, 778 (Or. 1979) (noting that since *Fasano* was decided, "the legislature has taken a very active role in the field of land use regulation"); *Norvell v. Portland Metro. Area Local Gov't Boundary Comm'n*, 604 P.2d 866, 899 (Or. Ct. App. 1979) (stating that increasing legislative involvement in the area of land use law implies "the time has come for Oregon courts to defer more to other branches of government").

38. See Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 188-89 (1997) (noting that "except in the exceptional instances of physical invasion or loss of all economic viability, the Supreme Court and lower courts typically reject takings challenges to government regulation").

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

40. See *id.* at 416 (stating that the diminution of value standard "is a question of degree—and therefore cannot be disposed of by general propositions"); see also Stewart Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *YALE L.J.* 203, 210 (2004) (arguing that with *Mahon*'s formulation of regulatory takings doctrine, "[g]overnment power to regulate land use had thus become a matter of degree, generating the doctrinal uncertainty that has endured to the present day").

“distinct investment-backed expectations.”⁴¹ Confusingly, two years later the Supreme Court established a slightly different test that included a due process component: A taking may occur when a regulation fails to substantially advance legitimate state interests (the due process component), or when it denies an owner some economically viable use of his land.⁴² Despite eighty-three years of regulatory takings jurisprudence, there are only two circumstances in which a federal court is sure to find a regulatory taking: *per se* cases that involve physical invasions, and situations in which the landowner is deprived of *all* economically viable use of the property.⁴³

If federal takings jurisprudence is tangled, state takings law has done little to clarify the problem. The language of Oregon’s state takings clause differs slightly from its federal counterpart,⁴⁴ but the Oregon Supreme Court has failed to clearly articulate how the state takings clause should be interpreted. Sometimes the Court suggests that it should be interpreted in exactly the same way as the federal takings clause, and sometimes it suggests the opposite.⁴⁵

Faced with hopelessly conflicted takings doctrine at both the federal and state levels, Oregon courts have muddled through regulatory takings cases and come up with a framework that heavily favors local governments.⁴⁶ They

41. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

42. See *Aguins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (setting out both components of takings analysis).

43. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (holding that any physical invasion, no matter how minor, constitutes a taking). Under *Lucas*, even landowners who have suffered a ninety-five percent depreciation in land value may recover nothing under this standard. *Lucas*, 505 U.S. at 1020 n.8. For an overview of Supreme Court takings doctrine, see Cordes, *supra* note 38, at 192-203.

44. Compare OR. CONST. art. I, § 18 (providing that “[p]rivate property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use”) with U.S. CONST. amend. V (providing that “nor shall private property be taken for public use, without just compensation”).

45. Compare *GTE Northwest, Inc. v. Pub. Util. Comm’n*, 900 P.2d 495, 501 n.6 (Or. 1995) (assuming “without deciding, that the analysis is the same under Article I, section 18, of the Oregon Constitution, and the Takings Clause of the Fifth Amendment”) and *Cereghino v. State Highway Comm’n*, 370 P.2d 694, 697 (Or. 1962) (stating that “[t]he Fifth Amendment of the Constitution of the United States and Article I, Section 18, of the Oregon Constitution are identical in language and meaning”) with *Suess Builders Co. v. City of Beaverton*, 656 P.2d 306, 309 n.5 (Or. 1982) (finding that “the criteria of compensable ‘taking for public use’ under art. I, § 18, are not necessarily identical to those pronounced from time to time by the United States Supreme Court under the fifth amendment”).

46. See, e.g., Richard M. Frank, *Inverse Condemnation Litigation in the 1990s*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 85-86 (1993) (stating that “the Court handed down more than twenty decisions in which the Takings Clause of the Fifth and Fourteenth Amendments was central” but that a “well-settled and understandable body of law” had not emerged); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562, 566-67 (arguing that courts have inconsistently applied the “diminution of value” test in part because the test itself was ambiguous as to the kind and extent of diminution that would trigger compensation).

Oregon's Measure 37

dismissed the *Penn Central* balancing test⁴⁷ and have declined to use the due process component, in part because Oregon's constitution lacks a due process clause.⁴⁸ Instead, Oregon courts have chosen to apply only the *per se* "denial of all economically viable use"⁴⁹ rule to decide takings cases.⁵⁰ Under that standard, landowners' regulatory takings claims can succeed only if the challenged land use regulation completely diminishes their property's value. Because the Oregon standard is so high, the state courts have held few land use decisions to constitute takings.⁵¹ Accordingly, landowners receive little protection from courts considering their takings claims.

3. *Invalidation of Measure 7*

A third contentious area involves the courts' invalidation of a 2000 ballot measure, Measure 7. The measure would have amended the takings clause of the state constitution⁵² to protect landowners from regulatory takings. Measure 7 resembled Measure 37 in many ways.⁵³ It would have required the government to compensate the landowner whenever a land use regulation "ha[d] the effect of reducing the value of a property upon which the restriction is imposed."⁵⁴ Oregon voters adopted the amendment in November 2000.⁵⁵

47. See *Dodd v. Hood River County*, 855 P.2d 608, 615 n.14 (Or. 1993) (stating that the "dictum in *Lucas* [incorporating the *Penn Central* factors] went far beyond what the majority opinion in that case needed to say to decide the issues presented"); *id.* at 615 ("This court has never held that investment-backed expectations are part of any Article I, section 18, taking analysis."); see also Tara J. Schleicher, Comment, *A Tale of Two Courts: Differences Between Oregon's Approach and the United States Supreme Court's Approach to Fifth Amendment Takings Claims*, 31 WILLAMETTE L. REV. 817, 847 (1995) (noting that "Oregon's refusal to use the *Penn Central* factors may be partly in response to its unique land-use planning system").

48. See Schleicher, *supra* note 47, at 832.

49. *Lucas*, 505 U.S. at 1019.

50. See, e.g., *League of Oregon Cities v. State*, 56 P.3d 892, 906 (Or. 2002) ("Article I, section 18, currently requires payment of just compensation only when a property owner demonstrates that a governmental regulation has deprive[d] the owner of *all* economically viable use of the property. If the owner has some substantial beneficial use of the property remaining, then the owner fails to meet the test.") (alteration in original) (internal quotation marks omitted); *Dodd*, 855 P.2d at 614-15 (using the *Lucas* test on denial of all economically viable use to deny the existence of a taking); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456-59 (Or. 1993) (applying *Lucas* to find no taking where owners of oceanfront lots had been denied a permit to build a seawall).

51. See, e.g., *Multnomah County v. Howell*, 496 P.2d 235, 238 (Or. Ct. App. 1972) (holding "a zoning ordinance is not . . . unconstitutional merely because it operates to reduce the value of the property or restrict its use to less than its most profitable use . . . [or because the property] may have greater value if otherwise zoned"). But see *Coast Range Conifers v. State*, 76 P.3d 1148, 1158 (Or. Ct. App. 2003) (holding that the state agency's refusal to allow logging on landowner's nine-acre parcel violated the state's takings clause because the restriction deprived landowner of all economically viable use), *aff'd on reh'g*, 83 P.3d 966 (Or. Ct. App. 2004).

52. OR. CONST. art. I, § 18.

53. There are two important differences between Measure 7 and Measure 37: 1) Measure 7 proposed a constitutional amendment, whereas Measure 37 proposed a new statute; and 2) Measure 37 includes a provision allowing the government to forgo enforcement, whereas Measure 7 did not.

54. Measure 7 (Or. 2000), in ONLINE VOTERS' GUIDE (2000), at <http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/m7.htm> (revised Feb. 2, 2001); cf. Peter Livingston, *Measure 7 and Property Rights: Pretty Simple? Pretty Fair?*, 61 OR. STATE BAR BULL. 9, 9

However, the Oregon Supreme Court subsequently voided Measure 7 for violating the state's "separate vote" requirement.⁵⁶ State law requires that each amendment to the state constitution be voted on separately⁵⁷ if such amendments are "substantive and . . . not closely related."⁵⁸ The Oregon Supreme Court found the measure invalid because Measure 7 failed to separately present for a vote the two constitutional changes, to takings and free expression, it would enact.⁵⁹

The Court's decision to void Measure 7 agitated and galvanized the property-rights coalition, which argued that court's ruling subverted the will of the people.⁶⁰ Measure 7 supporters gave the legislature a final chance to enact a more measured compensation statute.⁶¹ Recent legislative efforts toward that goal gave them hope,⁶² but the legislature failed to formulate a new compensation statute after Measure 7 was struck down.⁶³

(June 2001) (arguing that "when it comes to defending property rights, Measure 7 is to the Fifth Amendment what a machine gun is to a musket").

55. See *League of Oregon Cities*, 56 P.3d at 896 (noting that "voters appear to have approved Measure 7" even before canvassing all of the votes was completed). Official results are not available due to a court order stopping the vote count. See Elections Div., Office of the Sec'y of State (Or.), Official Results, November 7, 2000 General Election, at <http://www.sos.state.or.us/elections/nov72000/other.info/result.htm> (last visited Mar. 9, 2005).

56. *League of Oregon Cities*, 56 P.3d at 909-11 (holding that the initiative substantially amended both the takings and free expression provisions of Oregon's state constitution, and that because those amendments were not closely related the initiative violated the separate-vote requirement).

57. See OR. CONST. art. XVII, § 1 ("When two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.").

58. *Armatta v. Kitzhaber*, 959 P.2d 49, 64 (Or. 1998) (stating that "the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related").

59. *League of Oregon Cities*, 56 P.3d at 909-11. Note that the free expression component of the landowner's claim related to subsection (c) of Measure 37, which permitted governments not to pay just compensation if the challenged regulation prohibited, among other uses, selling pornography. *Id.* at 907-08.

60. See, e.g., Oregonians in Action, *Oregon Supreme Court Invalidates Measure 7 and Overturns Will of People*, <http://oia.org/Measure7UpdateOct2002.htm> (last visited Mar. 9, 2005).

61. See Cordes, *supra* note 38, at 226 (stating that it is "precisely because the judicial takings standard fails to provide the level of protection sought by property rights groups that they have resorted to the legislative arena" (emphasis added)).

62. In 1995, the legislature had attempted to enact a compensation statute that would have required that government compensate landowners if the value of their land was diminished by more than ten percent as a result of environmental regulations. However, the bill was vetoed by then-Governor Kitzhaber, who took pride in his radical approach to environmental stewardship. Governor Kitzhaber remained in office until 2003, probably deterring legislators from proposing another compensation statute. See Jeff Mapes, *Kitzhaber Chops Down "Ecotake" Bill*, OREGONIAN, July 14, 1995, at D1 (describing property rights groups' negative reactions to his veto); see also David Steves, *Oregon Governor Nears Veto Record*, REG.-GUARD, Aug. 19, 1999 (observing that Governor Kitzhaber vetoed dozens on bills in 1999, including a number of bills that he perceived to threaten Oregon's land use system).

63. See Deborah Howe et al., *What's on the Horizon for Oregon's Planners?*, 70 J. AM. PLAN. ASS'N 391 (2004).

Oregon's Measure 37

II. HOW FAR THE THIRD ACTOR MAY SHIFT THE BALANCE

Oregon's land use system failed to provide citizens with an adequate level of protection from regulatory takings, primarily because both the legislature and the courts went too far in developing Oregon's land use system without providing adequate remedies for aggrieved landowners. After a long history of cooperation, the public and government became misaligned, and their attitude toward each other adversarial. Citizens' frustration solidified into broad support for radical action: Measure 37. By enacting Measure 37, Oregonians used the ballot initiative to cement their position as a significant counterbalance to the legislature and the courts. However, the dramatic substantive changes proposed by Measure 37 raise a new, important question: how far did the public go in tilting the balance?

A. *The Third Actor As a Counterweight*

For many years, the public and the two institutional actors shared a common goal—protection of their environmental resources—and a preferred method for achieving that goal. However, in part due to a shift in the cultural and political climate, the public and government drifted apart. As a result, the public has become a significant counterweight to the actions (or inaction) of the legislature and the courts.

In the early days after the passage of SB 100, the public strongly supported the expansion of the land use system and the development of comprehensive planning. In 1976, 1978, and 1982, Oregon voters—including many conservative groups—rejected anti-planning initiatives by margins of ten to twenty percent.⁶⁴ Well into the mid-1980s, Oregonians were optimistic about planning and united in preserving the natural resources that comprised the state's main economic base.⁶⁵

64. 1000 Friends of Oregon, *Overview and Accomplishments of the Oregon and Metro Portland Planning Programs*, at <http://www.friends.org/resources/planaccomp.html> (Sept. 1998); see Elections Div., Office of the Sec'y of State (Or.), *Initiative, Referendum and Recall 1972-1978*, in THE OREGON BLUEBOOK, <http://bluebook.state.or.us/state/elections/elections19.htm> (last visited Mar. 9, 2005) (noting the results of Measure 10, "Repeals Land Use Planning Coordination Statutes," which in 1976 was defeated by a margin of 402,608 to 536,502, and another Measure 10, "Land Use Planning, Zoning Constitutional Amendment," which in 1978 was defeated by a margin of 334,523 to 515,138); Elections Div., Office of the Sec'y of State (Or.), *Initiative, Referendum and Recall 1980-1987*, in *id.*, <http://bluebook.state.or.us/state/elections/elections20.htm> (last visited Mar. 9, 2005) (noting the results of Measure 6, "Ends State's Land Use Planning Powers, Retains Local Planning," which in 1982 was defeated by a margin of 461,271 to 565,056); see also Liberty, *supra* note 12, at 368 (noting that in the mid-1990s, "when conservatives gained control of both houses of the Oregon legislature, other, traditionally conservative organizations, most notably the Oregon Farm Bureau Federation and the Oregon Forest Industry Council, rallied to the defense of the planning program when it was under attack").

65. See Sullivan, *supra* note 34, at 846 (stating that Oregon is unique "in the homogeneity of its population; its political and social traditions; the extensive use it has made of the initiative, referendum, and recall; and the concern it has for protecting agricultural and forestry resources, the economic base of the state").

To a certain extent, the current misalignment resulted from unmanageable forces. Over time, a shifting economy and population growth changed the public mindset. The economy no longer relies primarily on natural resources, so one of the government's primary goals in land use planning—protecting forests and mining land—is outmoded. The Oregon population has grown substantially since 1973, rendering many regulations, like the urban growth boundaries, unduly restrictive.⁶⁶ Moreover, many Oregonians today were not around in the early 1970s when SB 100 and other statewide planning legislation developed. One commentator questions whether newcomers and young people can grasp the importance of Oregon's unique land use system.⁶⁷

The significant changes help explain why the image of Oregon as a bastion of left-leaning thinkers,⁶⁸ tolerant of planners' intrusions, is outdated. Few should have been surprised that Measure 37 passed in 2004. Besides supporting Measure 37, Oregonians voted against Measure 34, which would have preserved certain state forests.⁶⁹ This may further indicate a subtle shift toward property rights and less governmental regulation in the formerly liberal state. Ballot initiatives like Measures 7 and 37 have addressed this new political reality better than either the legislature or the courts.⁷⁰

B. *How Far Does Measure 37 Go?*

Measure 37 could have radical effects. Proponents believe that the law will encourage local governments to “achieve their objectives through owner incentives and education efforts, not the iron fist of regulation.”⁷¹ They also hope that Measure 37 will make the land use system more fair by ensuring that landowners are better protected from government's infringements.

66. Between 1990 and 2000 alone, Oregon's population grew by 20.4 percent. U.S. Census Bureau, Oregon QuickFacts, <http://quickfacts.census.gov/qfd/states/41000.html> (last revised Feb. 1, 2005).

67. See Sullivan, *supra* note 22, at 843 (stating that “[p]eople who move to Oregon or who are coming of age simply do not remember the history and reasons we had for putting so much blood and treasure into our land use program”).

68. See Jeff Kosseff, *Oregon Voters' Recent Defeat of Tax Measure Inspires Antitax Activists*, OREGONIAN, Feb. 7, 2004, at A1; (discussing Oregonians' perceived liberalness in the context of their failure to pass a tax increase); Susannah Rosenblatt, *The Race to the White House: Oregon Primary May be Last Stand for Kucinich*, L.A. TIMES, May 16, 2004, at A20 (describing “Oregon, whose Democratic voters often display a strong liberal bent”).

69. See OREGON VOTERS' PAMPHLET, *supra* note 2, at 26-28; Elections Div., Office of the Sec'y of State (Or.), November 2, 2004, General Election Abstract of Votes: State Measure 34, at <http://www.sos.state.or.us/elections/nov22004/abstract/m34.pdf> (last visited Mar. 9, 2005).

70. See generally Hans Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735 (1998) (offering a theory under constitutional law for accommodating lawmaking by public initiative).

71. Dave Hunnicutt, *In My Opinion the Sky Is Not Falling Under Measure 37*, OREGONIAN, Nov. 24, 2004, at C9. In Oregon, citizens may print arguments in the state voters' pamphlet either favoring or opposing ballot measures by purchasing space for \$500 or by submitting 1,000 signatures. OREGON VOTERS' PAMPHLET, *supra* note 2, at 3. In this election, dozens of arguments were filed for each side. See *id.* at 105-18 (arguments in favor); *id.* at 119-32 (arguments in opposition).

Oregon's Measure 37

Critics charge that Measure 37 threatens not only to undermine all of Oregon's land use protections, but also to bankrupt local governments in the process.⁷² One commentator has suggested that what "got lost in the debate . . . was the land" itself: the delicate ecologies which, if mismanaged, can cause entire societies to fail.⁷³ Some may worry that other states, several of which have adopted Oregon's approach to statewide land use planning, will begin rolling back their own land use protections.⁷⁴ A true comparative analysis is beyond the scope of this Comment, but there are indications that groups in other states may copy the strategies of the measure's backers in their own efforts to strengthen property rights.⁷⁵ Finally, commenting on the financial implications of a rule similar to Measure 37, the Supreme Court has famously said that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Just evaluating landowners' claims—not including any payouts—is expected to cost Oregon's state and local governments between \$64 and \$344 million per year.⁷⁶ The cost of payouts cannot yet be estimated and will depend on the way state and local governments enforce the new law.

For their part, representatives of local governments are viewing the law as "the ultimate Catch-22."⁷⁷ Each local government must craft its own application process for resolving Measure 37 claims. If local governments formulate an overly complex application process for regulatory takings claims, they will undermine the spirit of the public mandate. But to take an "anything goes" attitude toward claims could result in a deluge of litigation that would damage the land use system that Oregonians have fought for decades to protect

72. Measure 37 was strenuously opposed by historic preservation, conservation, and community-based groups. See 1000 Friends of Oregon, Partial List of Organizations Opposed to Measure 37, at <http://www.friends.org/issues/documents/M37endorsed.pdf> (last visited Mar. 9, 2005).

73. Malcolm Gladwell, *The Vanishing*, NEW YORKER, Jan. 3, 2005, at 70, 73 (reviewing JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2005)). Gladwell discusses Measure 37 in light of *Collapse* because the book historically demonstrates how societies have historically "fail[ed] . . . when they mismanage[d] . . . environmental factors." *Id.* at 70.

74. See Schleicher, *supra* note 47, at 826 n.81 (listing the efforts of Maryland, California, Maine, Rhode Island, Virginia, Florida, and Vermont) (citing Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review for Other States*, 22 ENVTL. L. REP. 10367, 10368 n.2 (1992)); see also James H. Wickersham, Note, *The Quiet Revolution Continues: The New Emerging Model for State Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 490-91 (1994) (noting that with Oregon's example, Georgia, Maine, Maryland, New Jersey, Rhode Island, Washington passed new planning laws, and Florida and Vermont amended existing laws substantially).

75. See *Paying for Property*, WALL ST. J., Nov. 9, 2004, at A18 (suggesting that Measure 37 is a "precedent that could spread to other states").

76. See OREGON VOTERS' PAMPHLET, *supra* note 2, at 103 (estimating the financial impact on state administrative expenditures to be between \$18 and \$44 million per year, with local government expenditures estimated at \$46 and \$300 million).

77. Laura Oppenheimer, *Oregon Cities Mount Defenses Against Voter-Passed Property Rights Law*, OREGONIAN, Nov. 28, 2004 (quoting Eugene mayor Jim Torrey).

and strengthen.⁷⁸

CONCLUSION

By passing Measure 37, Oregonians demonstrated that, at least in the context of regulatory takings, government had gone too far. Voters were frustrated by the ever-expanding regulatory system, the courts' incoherent takings law, and thwarted attempts (like Measure 7) to protect their property rights. As a last resort, they chose to clarify their role as a collective third actor through the dramatic measure of a ballot initiative.

While it remains unclear whether Measure 37 will have ripple effects in other states, it has the potential to work a radical change on Oregon's land use system. Planners and politicians finally recognize that Oregonians value individual property rights and that they "can no longer rely on regulations to mold the type of communities they want."⁷⁹ Measure 37 has served as a wake-up call to legislators, judges, and land use officials to clarify and streamline existing law, lest the people take the law in their own hands and—as they may have done in Oregon—"go too far" themselves.

78. *But see* Robert Liberty, *Planned Growth: The Oregon Model*, 13 NAT. RESOURCES & ENV'T 315 (1998) (commenting that when the legislature created the LUBA, a wave of litigation was expected—but land use claims actually constitute less than one percent of all appealable decisions).

79. Laura Oppenheimer, *Land Use Laws on Turf That Is Uncharted*, OREGONIAN, Nov. 4, 2004, at A1.