

THE BATTLE OVER PROPERTY RIGHTS IN OREGON: MEASURES 37 AND 49 AND THE NEED FOR SUSTAINABLE LAND USE PLANNING

DAVID J. BOULANGER*

I. INTRODUCTION: A NATION AT WAR AND THE BATTLE OVER PROPERTY RIGHTS IN OREGON

Our nation is at war, but it is for the most part a silent war. Unlike the wars in Iraq and Afghanistan, which grab the front-page headlines on a daily basis, this war is taking place in our own backyards. From state to state and city to city across the U.S., there is a battle taking place over our nation's most valuable resource—land. This is not a new war, but one that has raged on since before the founding of our nation. However, today it has taken on a new meaning and the significance of victory for both sides is more important than ever. On the one side, there are those fighting to preserve farmland, forestland, and other open spaces put at risk from unchecked growth. On the other side, there are those fighting to preserve the rights of private property owners against the threat of government regulation. Both sides adamantly stand by their positions and are vehemently opposed to giving an inch of ground in the battle.

Since the 1970s, when Oregon instituted a revolutionary new state-wide growth management system, Oregon has been considered a leader in the battle to prevent urban sprawl.¹ However, private property rights advocates would not give in so easily. In November 2004, the battle returned to Oregon when voters approved Measure

* J.D. Candidate, Willamette University College of Law, 2009; B.A., University of Oregon, International Studies. First and foremost I would like to thank my wife, Kristina Boulanger, who provided me with the support and encouragement to complete this paper. I am eternally indebted to my mother, Dr. Debra Shein, who guided me along the way. I would also like to thank Professor Susan Smith for sparking my interest in sustainability law. Finally, I would like to thank the staff of the Willamette Law Review for their efforts and valuable input.

1. ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 222–23 (1999).

37.² The measure required just compensation to be paid to private property owners whenever a land use regulation enacted after the owner acquired the land had the effect of restricting the owner's use of the property, thereby reducing its fair market value (FMV).³ In lieu of paying just compensation, which the state and local governments were financially incapable of, the measure allowed the state and local governments to waive the regulation at issue and allow the property owners to develop the land.⁴ In 2006, the Oregon Supreme Court upheld the constitutionality of Measure 37.⁵ However, advocates of sustainable development fought back. In a controversial November 2007 special election, Oregon voters approved Ballot Measure 49, which will modify Measure 37 by limiting large developments, among other things.⁶ Measures 37 and 49 represent the ongoing conflict between private property rights advocates and those who advocate sustainable development through the use of government regulation. With the passage of Measure 49, advocates of sustainable development won a small battle in the war to protect Oregon's natural resources and way of life.⁷

Oregon's unique land use planning laws have attracted national attention in the debate on private property rights. The attention arises out of Oregonians' progressive nature in protecting natural resources, and more recently, in protecting the rights of property owners.⁸ This battle is likely to continue to rage on in the courts and legislature in the coming years as property owners and developers try to figure out how the recently-approved Measure 49 will impact them. Opponents of Measure 49 argued that the law would allow state and local

2. See November 2, 2004, General Election Abstract of Votes: State Measure No. 37, <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf> (last visited Oct. 23, 2008) (codified at OR. REV. STAT. §197.352 (2005)).

3. Measure 37, Text of Measure, at § 1, http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Nov. 22, 2008).

4. *Id.* at § 8.

5. *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 322 (Or. 2006).

6. Measure 49, Text of Measure, at § 6(2), http://www.sos.state.or.us/elections/nov62007/guide/m49_text.html (last visited Nov. 22, 2008) (amending OR. REV. STAT. §§ 93.040, 197.352).

7. See generally RUTHFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW AND PUBLIC POLICY* 38 (1996) (describing the struggle of private property interests against governmental constraints as a "battlefield").

8. JULIAN C. JURGENSMAYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW*, 9-10 (2007).

governments to take property without compensation.⁹ Opponents also argued that the property owners who received approval under Measure 37 to develop their land would have their approvals invalidated, thus creating the taking of a property interest.¹⁰

The short-term effect of Measure 49 will be to place the government back in a position to regulate urban growth and land use to protect natural resources. As a matter of public policy, the government should be able to regulate urban growth to prevent uncoordinated development schemes and the destruction of Oregon's valuable natural resources. However, in order to have a viable land use planning program for the future, Oregon needs to integrate the concept of sustainable development into the substance of its goals. In addition, in order to maintain an effective program that can preserve and protect valuable natural resource areas while at the same time appease the economic interests of private property owners, the system should include a transferable development rights program.

Measure 49 will pose significant challenges to property owners in its implementation process, but even more significantly, the measure will impact the future of Oregon's land use planning laws and the ability of land use planners to promote sustainable development. This paper explores the basis of Oregon's land use planning laws and the challenges land use planning advocates will face in the future. It will look at the implementation process of Measure 49 to determine how it will impact affected parties. In addition, this paper explores the notion that opponents of Measure 49 are wrong in looking at the overall debate on property rights through merely the limited perspective of taking without just compensation. Rather, takings jurisprudence needs to be formulated to consider the bigger picture of sustainability in land use planning in order to protect valuable natural resources. This paper also addresses the need to incorporate a workable definition of sustainable development into any future proposed changes to the current land use regulations.

Part II of this paper discusses Oregon's controversial history of land use planning regulations. Part III examines Measure 37's impact on land use planning. Part IV explores Measure 49 and the issues

9. Sen. Larry George & Rep. Bill Garrard, Arguments in Opposition, Measure 49, http://www.sos.state.or.us/elections/nov62007/guide/m49_opp.html (last visited Nov. 22, 2008).

10. *See generally* Arguments in Opposition, Measure 49, http://www.sos.state.or.us/elections/nov62007/guide/m49_opp.html (last visited Nov. 22, 2008).

raised by its implementation. Part V looks at the underlying scheme of the land use laws in Oregon and makes the argument that government regulations restricting land use are appropriate in the modern world in order to protect the natural resources of the state. Part VI explores the need to integrate sustainability into the land use planning system, and it explores alternatives to the current system.

II. BACKGROUND: OREGON'S HISTORY WITH LAND USE REGULATIONS

A. *The National Well-Orchestrated Just Compensation Movement*

The history of Oregon's modern land use regulations dates back to the 1970s, when Oregon voters approved a comprehensive statewide planning regime.¹¹ One effect of this regime was to create urban growth boundaries (UGBs) around Oregon's cities in order to protect high value forest and farmlands.¹² The adoption of the statewide land use planning scheme was a reflection of Oregonians' desire to promote sustainable development and to protect the state's renowned natural areas, and it was also part of a larger nationwide "Quiet Revolution" to reform land use planning laws.¹³ However, state land use planning laws came to be seen as an encroachment on private property rights, and a movement began to undo decades worth of work in state land use planning.¹⁴ Private property rights advocates put on an aggressive campaign in 2004, and passed Measure 37, thereby drastically changing the focus of state land use planning.¹⁵ Measure 37 was a potential threat to what many Oregonians had worked hard to achieve, and it was not long before proponents of state land use planning launched a counter-attack through Measure 49. Proponents of Measure 49 sought to limit the impact of Measure 37 by restricting large development under Measure 37 claims on certain high value farmlands and forestlands.¹⁶ However, under Measure 49,

11. Or. Dep't of Land Conservation & Dev., Goals, <http://www.oregon.gov/LCD/goals.shtml> (last visited Nov. 22, 2008).

12. See, e.g., Or. Dep't of Land Conservation & Dev., *Oregon Land Use Laws Update—Urban Growth Boundaries and Future Growth*, INSIDE THE BOUNDARIES, May 2000, <http://www.oregon.gov/LCD/docs/publications/insideboundaries.pdf> (last visited Nov. 22, 2008).

13. See PLATT, *supra* note 7, at 347–50.

14. See Ryan Daugherty, *2006 Eminent Domain Ballot Initiatives: Citizens' Voice Or Crying Wolf?* 21 J. NAT. RESOURCES & ENVTL. L. 99 (2007).

15. See *id.* at 106.

16. Measure 49, Explanatory Statement, para. 5, http://www.sos.state.or.us/elections/nov62007/guide/m49_es.html (last visited Nov. 22, 2008).

qualified claimants will still be able to build a specified number of houses, although limited, on their property.¹⁷

B. The “Quiet Revolution” Comes to Oregon: Senate Bill 100 and the Creation of the DLCD

In the 1970s, a trend toward the revesting of land use control in the state government began.¹⁸ Oregon was quick to join the land use revolution.¹⁹ In 1973, Oregon’s Legislature adopted Senate Bill 100, creating Oregon’s Statewide Planning Program.²⁰ In a speech at the opening of the 1973 legislative session, then Governor Tom McCall called attention to the need to create a state land use policy that protected the interests of Oregonians from the threat of unregulated urban development. He remarked that “unlimited and unregulated growth leads inexorably to a lowered quality of life.”²¹ Senate Bill 100 created the Department of Land Conservation and Development (DLCD)²² and the Land Conservation and Development Commission (LCDC).²³ A seven-member volunteer citizens’ board runs LCDC, which provides guidance for the DLCD.²⁴ The overall mission of the DLCD is to “[s]upport all of our partners in creating and implementing comprehensive plans that reflect and balance the statewide planning goals, the vision of citizens, and the interests of local, state, federal and tribal governments.”²⁵ The purpose of the DLCD is to guide land use policy to “[f]oster livable, sustainable development in urban and rural areas; [p]rotect farm and forest lands and other natural resources.”²⁶ The Comprehensive Land Use

17. Measure 49, *supra* note 6, at §§ 6–9.

18. See FRED P. BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1972).

19. See PLATT, *supra* note 7, at 347–50.

20. S.B. 100, 57th Leg. Assem., Reg. Sess. (Or. 1973), available at <http://www.oregon.gov/LCD/docs/bills/sb100.pdf>.

21. Gov. Tom McCall, Speech, para 2, available at <http://www.oregon.gov/LCD/history.shtml> (last visited Oct. 23, 2008) (this website provides a link to an audio recording of the speech).

22. S.B. 100, *supra* note 20.

23. *Id.* at § 5.

24. *Id.*

25. Dep’t of Land Conservation & Dev., Mission Statement, http://www.oregon.gov/LCD/about_us.shtml (last visited Nov. 22, 2008).

26. Dep’t of Land Conservation & Dev., Vision Statement, http://www.oregon.gov/LCD/about_us.shtml (last visited Nov. 22, 2008).

Planning Act codified much of Senate Bill 100.²⁷ The DLCD administers the planning program.²⁸ According to the DLCD, “[t]he program affords all Oregonians predictability and sustainability in the development process by allocating land for industrial, commercial and housing development, as well as transportation and agriculture.”²⁹ The DLCD is organized into five divisions, including a special division to evaluate and resolve Measure 37 claims, which now called the Measure 49 division.³⁰

The LCDC’s first task when it was created was to adopt fourteen statewide planning goals to govern local land use plans.³¹ Today, Oregon has nineteen statewide planning goals that are administered by the DLCD.³² According to the DLCD, “[t]he goals express the state’s policies on land use and on related topics, such as citizen involvement, housing, and natural resources.”³³ Goals that are adopted by the commission become the mandatory statewide planning standards.³⁴ These goals are typically accompanied by a set of guidelines, which are a set of suggested directions intended to assist local governments in carrying out the required goals.³⁵ The statewide planning goals adopted by the commission are carried out through local comprehensive planning.³⁶ Pursuant to state law, it is the duty of every city and county to “[p]repare, adopt, amend and revise comprehensive plans in compliance with goals approved by the

27. OR. REV. STAT. § 197 (2005).

28. Dep’t of Land Conservation & Dev., Organization, http://www.oregon.gov/LCD/about_us.shtml (last visited Nov. 22, 2008).

29. Dep’t of Land Conservation & Dev., Organization, http://www.oregon.gov/LCD/about_us.shtml (last visited Nov. 22, 2008).

30. Dep’t of Land Conservation & Dev., Programs, http://www.oregon.gov/LCD/about_us.shtml (last visited Nov. 22, 2008).

31. Dep’t of Land Conservation & Dev., History of Oregon’s Land Use Planning, <http://www.oregon.gov/LCD/history.shtml> (last visited Nov. 22, 2008).

32. Dep’t of Land Conservation & Dev., Goals, *supra* note 11 (The titles of the goals are: Goal 1, Citizen Involvement; Goal 2, Land Use Planning; Goal 3, Agricultural Lands; Goal 4, Forest Lands; Goal 5, Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 6, Air, Water, and Land Resources Quality; Goal 7, Areas Subject to Natural Disasters and Hazards; Goal 8, Recreational Needs; Goal 9, Economic Development; Goal 10, Housing; Goal 11, Public Facilities and Services; Goal 12, Transportation; Goal 13, Energy Conservation; Goal 14, Urbanization; Goal 15, Willamette River Greenway; Goal 16, Estuarine Resources; Goal 17, Coastal Shorelands; Goal 18, Beaches and Dunes; Goal 19, Ocean Resources.) Promulgated as OAR 660-015-0000(1)-(19).

33. *Id.*

34. OR. REV. STAT. § 197.015(9) (2005).

35. § 197.015(10).

36. OR. REV. STAT. § 197.175 (2005).

commission”³⁷ and “enact land use regulations to implement their comprehensive plan.”³⁸ While local governments may utilize the guidelines in preparing land use plans, the guidelines are not mandatory—in developing land use plans, the local government can develop alternative means to carry out the goals.³⁹ The plan should contain a factual basis.⁴⁰ The factual basis for a plan should include information on the capabilities and limitations of natural resources.⁴¹

C. Oregon’s Identity Crisis: The Foundation for the Passage of Measure 37

During the past several decades, Oregon has experienced a period of high economic growth marked by a rapid population growth—especially in the Portland metropolitan area, the center of the economic activity.⁴² This growth period can be seen as Oregon’s modern version of the urban revival that gave rise to the European cities beginning in the eleventh century.⁴³ Oregon’s boom can also be seen in context as part of a larger nationwide population shift from the Northeast and Midwest to areas in the South and West.⁴⁴ But it was not until the 1980s that Oregon’s urban revival really kicked off, as Oregon shifted from a resource-based economy, which disappeared with the timber industry, to a manufacturing based economy with strong ties to the high-tech industry.⁴⁵ As a result of this shift, the state’s focus shifted from rural Oregon to its metropolitan areas—specifically the Portland metropolitan area, as the center of the new high tech industry. With this shift in industry came a surge in the

37. § 197.175(2)(a).

38. § 197.175(2)(b).

39. OAR 660-015-0000(2), pt. III, available at <http://www.oregon.gov/LCD/docs/goals/goal2.pdf> (last visited Nov. 22, 2008).

40. *Id.*

41. *Id.*

42. Executive Summary, *Portland in Focus: A Profile from Census 2000*, THE BROOKINGS INST., Nov. 2003, available at http://www.brookings.edu/reports/2003/11_living_cities_portland.aspx (last visited Nov. 22, 2008).

43. *Cf.* PLATT, *supra* note 7, at 69 (characterizing the European urban revival as: (1) an increase in urban populations largely due to migration from rural areas; (2) reappearance of a middle class engaged in manufacturing and commerce; (3) physical growth of towns inside and outside fortified areas; (4) the emergence of the municipality as a new legal institution independent of feudalism; and (5) the onset of urban problems such as water supply, disease, and fire).

44. *Id.* at 305.

45. Oregon Blue Book, Oregon’s Economy: Overview, <http://bluebook.state.or.us/facts/economy/economy01.htm> (last visited Nov. 22, 2008).

employment market during 2004 through 2006, with jobs in trade, transportation, and utilities accounting for 20 % of jobs.⁴⁶

The employment boom spawned a housing boom as more Oregonians sought the American dream of owning their own home. Notably, during this time period, the construction industry was the fastest growing sector of the Oregon economy, growing by more than 12%—the third fastest growing construction industry in the U.S.⁴⁷ The urban revival also led to unprecedented growth in the population centers that were home to the state's new industries. From 1980 to 2006 the population of the counties around Portland surged. Clark County increased by 115%, Washington County saw a population increase of 109%, Clackamas County 55%, and Multnomah County 21%.⁴⁸ Other notable population surges occurred in Deschutes County (Bend), growing by 140% and Hood River County, growing by 36%.⁴⁹ Throughout this high-growth time, it was impossible to drive through one of Oregon's metropolitan areas, especially Portland, without noticing the construction boom in the residential housing market. In 2000, it was estimated that 56% of residents owned their own homes—a considerable rise in the homeownership rate.⁵⁰ According to the U.S. Census Bureau, new housing permits for residential homes in Oregon went from less than 7,500 in 1982 to around 20,000 in the year 2000, with a peak of over 31,000 permits issued in 2005.⁵¹ The high demand for new residential housing, coupled with record low interests rates for homebuyers, led to a never-before-seen demand for developable land in Oregon.⁵²

In summary, several trends led to Oregon's urban revival, including: (1) a shift in the economy from resource dependence to

46. Oregon Blue Book, Oregon's Economy: Employment, <http://bluebook.state.or.us/facts/economy/employment.htm> (last visited Nov. 22, 2008).

47. *Id.*

48. U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/states/41000lk.html> (last visited Oct. 23, 2008); Portland Research Center, Census Statistics, http://www.pdx.edu/media/p/r/prc_Components_pop_change_90thru2000.pdf (last visited Oct. 23, 2008).

49. U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/states/41000lk.html> (last visited Oct. 23, 2008); Portland Research Center, Census Statistics, http://www.pdx.edu/media/p/r/prc_Components_pop_change_90thru2000.pdf (last visited Oct. 23, 2008).

50. Executive Summary, *Portland in Focus*, *supra* note 42.

51. U.S. Census Bureau, Housing Units Authorized by Building Permits, <http://www.census.gov/const/www/C40/table2.html#annual> (last visited Nov. 22, 2008).

52. See *Record Low Interest Rates Spur Buyers, Says NAR*, REALTY TIMES, Oct. 25, 2002, available at http://realtytimes.com/rtpages/20021025_narrates.htm.

high tech manufacturing; (2) an increase in industry jobs focused around metropolitan areas of Oregon; (3) an increase in population of Oregon's cities; and (4) a boom in the residential housing market in and around Oregon's cities. As contended in this paper, these trends played a significant role in laying the foundation for a robust economic market in the residential housing sector that made the passage of Measure 37 seem so appealing to so many Oregonians who had little at stake in the issue.

III. MEASURE 37

A. An Overview

More than 30 years after Senate Bill 100 was passed, Oregonians voted to take a drastic turn in statewide land use planning. Measure 37 was part of a larger nationwide private property rights attack against the proponents of governmental regulation, an attack which saw the introduction of "takings and vested rights legislation in Congress and in every state."⁵³ With the passage of Measure 37 in November 2004 with 61% of the vote, Oregon would again propel itself to the forefront of the debate on property rights and sustainable land use planning.⁵⁴ Measure 37, codified at ORS 197.352, provides that the owners of private real property in Oregon are entitled to receive just compensation when a "public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property . . . and has the effect of reducing the fair market value of the property."⁵⁵ The measure allowed that in lieu of just compensation, "the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation . . . to allow the owner to use the property for a use permitted at the time the owner acquired the property."⁵⁶

As of December 5, 2007, there were 6,857 Measure 37 claims filed with the Measure 37 Division of the DLCD, totaling more than \$19.8 billion in requested compensation.⁵⁷ According to the Institute

53. FREILICH, *supra* note 1, at 4.

54. November 2, 2004, General Election Abstract of Votes, *supra* note 2.

55. OR. REV. STAT. § 197.352(1) (2005).

56. § 197.352(8).

57. Dep't of Land Conservation & Dev., Measure 37, Summaries of Claims Filed in the State, http://www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml#Summaries_of

of Metropolitan Studies (IMS), a research center at Portland State University that was hired to build a database of Measure 37 claims, the majority of Measure 37 claims came from the Willamette Valley and specifically from Clackamas County, which primarily lies just outside Portland's urban growth boundary.⁵⁸ Of the claims filed, the majority of the land was in areas that had been previously zoned for Exclusive Farm Use (2,877 claims), Forest Use (1,021 claims), Farm Forest Use (928 claims), and Rural Residential Use (628 claims).⁵⁹ The total acreage affected by Measure 37 claims topped 792,000 acres.⁶⁰ As can be seen by these figures, a lot of very valuable property is at stake in the current land use battle. Further at stake are individuals' private property rights and their ability to develop their land as they see fit. These valuable interests are positioned in opposition to the government's ability to enact land use regulations, which provide for the protection of Oregon's valuable natural resources against unchecked urban sprawl.

B. Procedure: How Measure 37 Worked

Measure 37 provided that "just compensation" be paid to the owner of property when a "public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior" to the passage of Measure 37.⁶¹ Basically, the "public entity" that enforced a land use regulation, even if it was a state statute required to be enforced by the local government, would be responsible for providing just compensation; the state would not be liable for such cases.⁶² Once a state agency, such as the DLCDC, received a Measure 37 claim, the agency would verify that the claimant was the owner of the property and the law that was enforced had the effect of restricting the "lawful use of the property in a manner that has reduced its fair market

Claims Filed in the State (last visited Nov. 22, 2008) [hereinafter *Summaries of Measure 37 Claims*].

58. The Inst. of Portland Metro. Studies, *Measure 37: Database Development and Analysis Project* tbl. 2, <http://www.pdx.edu/ims/m37database.html> (last visited Nov. 22, 2008).

59. *Id.* at tbl. 1.

60. *Id.*

61. Measure 37, *supra* note 3, at § 1.

62. GOV. TED KULONGOSKI, 2004 OREGON BALLOT MEASURE 37: INITIAL QUESTIONS & ANSWERS 1-2 (Feb. 28, 2005), available at <http://www.oregon.gov/LCD/docs/measure37/m37qanda.pdf>.

value.”⁶³ Measure 37 did not provide a source of funds to be paid as just compensation, so state agencies chose to waive the regulations at question, thus allowing the property owner to develop their land.⁶⁴ The measure specifically enumerated which land use regulations were subject to the law.⁶⁵ Generally, there were four types of laws that had the effect of restricting the “lawful use” of private property:

- a) laws that limit what types of uses may be carried out on private real property or that prohibit a specific use (many zoning laws would come within this category);
- b) laws that provide that a government entity may allow the use, subject to certain standards, conditions or requirements;
- c) laws that limit how a use of real property may be carried out, by restricting the area of the property that may be used or by restricting the times at which the property may be used;
- d) laws that impose affirmative obligations on the use of property, such as a requirement to dedicate property for roads and sidewalks.⁶⁶

However, the measure did provide for several categories of regulations that were exempt from the law, including “[r]estricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations.”⁶⁷ Interestingly, by the way the measure was written, the

63. *Id.* at 3.

64. *Id.*

65. Measure 37, *supra* note 3, at § 11(B).

“Land use regulation” shall include: (i) Any statute regulating the use of land or any interest therein; (ii) Administrative rules and goals of the Land Conservation and Development Commission; (iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances; (iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and (v) Statutes and administrative rules regulating farming and forest practices.

Id.

66. KULONGOSKI, *supra* note 62, at 5.

67. Measure 37, *supra* note 3, at § 3(A)-(E).

Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act; (B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations; (C) To the extent the land use regulation is required to comply with federal law; (D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection,

public safety exception did “not include laws for the protection of economic, social or aesthetic interests (or that aspect of the traditional “police power” that may be described as “general welfare”).”⁶⁸ Thus, laws that were enacted for the purpose of protecting economic interests would require that just compensation be paid to the property owners. This is interesting because just a year after the passage of Measure 37, the U.S. Supreme Court, in *Kelo v. City of New London*, held that the city’s economic redevelopment project at issue was a public use within the meaning of the Fifth Amendment.⁶⁹

C. *The Impact of Measure 37*

According to an impact study of Measure 37 conducted by IMS, the effect of Measure 37 has been to disable “the tools used over the past four decades to prevent sprawl and preserve agricultural and forest land in Oregon.”⁷⁰ Furthermore, Measure 37 interferes or prevents Oregon from carrying out many of the nineteen land use planning goals adopted by the LCDC.⁷¹ For example, the impact study notes that the state is prevented from carrying out the second goal of land use planning by requiring the state to make development decisions based not on facts regarding potential impacts and the “social, environmental, economic, and energy needs of a community,” but rather on an individual property owner’s wishes, when the property was purchased, “and the land use laws in force at that time.”⁷² Furthermore, the impact study goes on to point out that policymakers were constrained by the necessity of considering whether any individual landowner might have his or her property interest adversely affected financially by any new regulation, thus preventing policymakers from enacting any new regulations that

however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or (E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

Id.

68. KULONGOSKI, *supra* note 62, at 6.

69. *Kelo v. City of New London*, 545 U.S. 469 (2005).

70. SHEILA MARTIN & KATIE SHRIVER, THE INST. OF PORTLAND METRO. STUDIES, DOCUMENTING THE IMPACT OF MEASURE 37: SELECTED CASE STUDIES, 4–6 (Jan. 2006), available at http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf [hereinafter MEASURE 37 IMPACT STUDY].

71. *Id.* at 4.

72. *Id.*

could positively impact the community as a whole.⁷³ In fact, in order to have prevailed on a Measure 37 claim, a property owner had to show that a land use regulation both restricted the use and reduced the value of the property.⁷⁴ The important question for local governments became “what constitutes a land use regulation?,” as opposed to asking, “what should land use regulations accomplish?”

The supporters of Measure 37 included Oregonians in Action, the property rights group that sponsored the measure.⁷⁵ The argument put forward in support of Measure 37 was premised on the constitutional requirement that government provide just compensation when it regulates property so as to effect a taking private property.⁷⁶ Opponents to the measure, which included Governor Kulongoski and the land-conservation watchdog group 1000 Friends of Oregon among others, argued that Measure 37 would hurt Oregon because it did not provide an adequate plan of implementation or source of revenue to put it into effect.⁷⁷ Oregon Secretary of State Bill Bradbury estimated that Measure 37 would cost \$344 million per year to administer.⁷⁸ In the end, property rights advocates won out over those Oregonians who advocated planned growth as opposed to unchecked development. As a result of the passage of Measure 37, many state and local governments were forced to grant waivers to Measure 37 claimants because the statute did not provide a source of funds to pay out compensation to the landowners.⁷⁹ In fact, it was the policy of the state to grant waivers to Measure 37 claimants, subject only to land use restrictions that were in place before the claimant purchased the land.⁸⁰

73. *Id.*

74. Measure 37, *supra* note 3, at § 1.

75. Measure 37, Explanatory Statement, *supra* note 16.

76. David J. Hunnicutt, *Oregonians in Action Urges a Yes Vote on Measure 37*, Arguments in Favor, Measure 37, http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html. See also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (setting forth the standard to determine when a governmental regulatory taking requires just compensation of landowners).

77. See generally Arguments in Opposition, Measure 37, http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_opp.html (last visited Nov. 22, 2008).

78. *Id.*

79. Summaries of Measure 37 Claims, *supra* note 57 (data from report of Feb. 21, 2006).

80. DEP'T OF LAND CONSERVATION & DEV., *BALLOT MEASURE 37 (2004) & PROPOSED BALLOT MEASURE 49, QUESTIONS & ANSWERS* (Oct. 15, 2007), available at http://www.oregon.gov/LCD/MEASURE37/docs/general/M37-M49_Q-A_101507.pdf.

D. The Legitimization of Measure 37: MacPherson v. Dep't of Admin. Servs.

In 2006, the Oregon Supreme Court was called on to review the constitutionality of Measure 37. Opponents of Measure 37, including the named party MacPherson, argued the measure was unconstitutional on both state and federal grounds.⁸¹ The trial court granted MacPherson's motion for summary judgment, thus declaring Measure 37 unconstitutional under both the Oregon and U.S. Constitutions.⁸² The ruling by the trial court was broad and would have dealt a formidable blow to property rights advocates had it withstood review by the Oregon Supreme Court. This controversial decision by Marion County Circuit Judge Mary Mertens James led to a recall petition that stated, "[b]y overruling Measure 37, Judge Mary James has disregarded the express will of the people of Oregon. Judge Mary James has undercut the fundamental, God-given right of Oregonians to truly own their property."⁸³

Writing on appeal for the Oregon Supreme Court, Chief Justice Paul DeMuniz posited that the court's "only function in any case involving a constitutional challenge to an initiative measure is to ensure that the measure does not contravene any pertinent, applicable constitutional provisions."⁸⁴ After dispensing with the issue of the justiciability of MacPherson's claim, the Oregon Supreme Court addressed the various grounds on which MacPherson claimed the measure was unconstitutional. The court unanimously held that:

- (1) Measure 37 does not impede the legislative plenary power;
- (2) Measure 37 does not violate the equal privileges and immunities guarantee of Article I, section 20, of the Oregon Constitution;
- (3) Measure 37 does not violate the suspension of laws provision contained in Article I, section 22, of the Oregon Constitution;
- (4) Measure 37 does not violate separation of powers constraints;
- (5) Measure 37 does not waive impermissibly sovereign immunity;
- and (6) Measure 37 does not violate the Fourteenth Amendment to the United States Constitution.⁸⁵

81. MacPhearson v. Dep't of Admin. Servs., 130 P.3d 308, 312 (Or. 2006).

82. *Id.*; See also MacPherson v. Dep't of Admin. Servs., No. 00C15769 (Or. Cir. Ct. Oct. 14, 2005), available at http://www.oregon.gov/LCD/docs/measure37/macpherson_opinion.pdf.

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

84. MacPhearson, 130 P.3d at 322.

85. *Id.*

2008]

MEASURES 37 AND 49

327

In so holding, the court showed judicial restraint, noting that the constitutionality determination, “is the only one that this court is empowered to make,” and that “[w]hether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond the court’s purview.”⁸⁶

Property rights advocates celebrated the decision, winning a battle in the larger war. As a result of the ruling, the Measure 37 division of DLCDC resumed the process of reviewing claims, which had been on hold since the trial court’s ruling had been issued.⁸⁷

IV. STRIKING A BALANCE: MEASURE 49

A. An Overview

Measure 37 was advertised as a way to protect the private property rights of individuals who wanted to be able to build a few houses on their land to supplement their income for retirement;⁸⁸ however, Oregonians quickly caught on to the fact that the measure was really a guise for developers to gain the ability to develop high-value farm and forestland to make a quick profit.⁸⁹ In response, a large coalition of groups and individuals launched an aggressive campaign to get Oregon voters to pass Ballot Measure 49 in order to modify Measure 37.⁹⁰ Advocates of Measure 49 asserted that the law would have the effect of curbing large development in order to protect high-value farm and forestland and the state’s water resources, while at the same time enabling Measure 37 claimants the ability to develop their land, although minimally.⁹¹

According to the Measure 49 advocates, a majority of the claims filed under Measure 37 were submitted by large developers, and if allowed to go forward, there would have been upwards of 2,700

86. *Id.*

87. Dep’t of Land Conservation & Dev., Measure 37, Legal Information, Supreme Court Reinstates Measure 37, Mar. 9, 2006, http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Supreme_Court_Reinstates_Measure_37.

88. See Rob Manning, *Certainty of Measure 49 Seems Uncertain at Best*, OPB NEWS, Oct. 8, 2007, <http://news.opb.org/article/certainty-measure-49-seems-uncertain-best/>.

89. See Yes on 49, Arguments in Favor, Measure 49, http://www.sos.state.or.us/elections/nov62007/guide/m49_fav.html (last visited Nov. 22, 2008).

90. See *id.*

91. Eric Morteson, *Measure 49 Study Finds Big Cutback*, OREGONIAN, Oct. 17, 2007, available at http://blog.oregonlive.com/washingtoncounty/2007/10/measure_49_study_finds_big_cut.html.

housing subdivisions built on previously-protected farm and forest land.⁹² In a study conducted in one Oregon county, it was estimated that the limits imposed by Measure 49 on approved Measure 37 claims would result in a loss of more than 80% of the otherwise allowable residential homes scheduled to be built.⁹³ This gives rise to another major issue that Measure 49 created relating to the vesting rights of claimants who received approval for developments of their land under Measure 37. Further, yet another issue arises under Measure 49 relating to its retroactive effect on previous awards under Measure 37. How the courts address these and other issues that arise from Measure 49 will determine its success in slowing the private property rights movement.

B. What Is Measure 49?

Measure 49 is an attempt to provide just compensation to private property owners who are adversely affected by land use regulations enacted after they purchased their land. The measure grants these property owners the limited ability to develop their land, while at the same time providing a rational framework for future potential regulatory takings claims and retaining the ability of the state to enact regulations to protect high-value natural resource land.⁹⁴ Measure 49 consists of two main parts: the first part addresses how Measure 37 claims that were filed on or before June 28, 2007, are dealt with;⁹⁵ the second part sets up a framework for dealing with any potential new Measure 49 claims.⁹⁶

C. How Measure 49 Will Affect Existing Measure 37 Claims

The first part of Measure 49, dealing with Measure 37 claims filed on or before June 28, 2007, asks whether the property is inside or outside any urban growth boundary, or whether the claimant

92. See Yes on 49, Arguments in Favor, Measure 49, http://www.sos.state.or.us/elections/nov62007/guide/m49_fav.html (last visited Nov. 22, 2008).

93. Mortensen, *supra* note 91 (finding of 637 approved Measure 37 claims allowing for 7844 homes to be built in Washington County only 1,260 would be allowed under Measure 49).

94. Measure 49, *supra* note 6, at § 3.

95. *Id.* at §§ 5–11.

96. *Id.* at §§ 12–15.

received a Measure 37 waiver and has a common law vested right to complete and continue the use.⁹⁷

1. Property Outside the UGB: Express and Conditional Options

For property outside the UGB, Measure 49 asks whether the property is on high-value farmland or forestland and not in an area where ground water is restricted.⁹⁸ If the property is on restricted land, then the claimant is limited to developing the number of houses described in a waiver or the original claim or three houses, whichever is fewer.⁹⁹ If there are houses already existing on the property, the owner is still limited to developing the land and cannot exceed a total of three houses on the property unless there were already three existing houses on the property, in which case the owner may be approved for one additional house.¹⁰⁰ This is what the DLCDC terms the “Express Option.”¹⁰¹ If the property (1) is outside the UGB, (2) is not on restricted land, and (3) the claim or waiver is for more than three homesites, then the owner has the option to proceed under what is known as the “Conditional Option.”¹⁰² The number of houses that can be built under the conditional option will range from four to ten, depending on a number of factors.¹⁰³ If there is a Measure 37 waiver or claim for fewer than ten parcels, then the approval under the conditional option will be limited to that number.¹⁰⁴ If there are already existing houses on the property, then the number of approved houses will be limited to a total of ten, including the existing houses.¹⁰⁵

Furthermore, the number of houses allowed is limited by the loss in value caused by the regulation(s) which gave rise to the Measure 37 claim, whereby the total value of approved houses cannot exceed the loss in value caused by the regulation.¹⁰⁶ For example, if the loss

97. *Id.* at § 5(1)-(3).

98. *Id.* at §§ 6, 7 (§ 6 controls where the property is high-value farm or forestland, and § 7 controls where the property is not on high-value farm or forestland).

99. *Id.* at § 6(2)(a)-(b).

100. *Id.* at §§ (6)(2)(b), (3).

101. DEP'T OF LAND CONSERVATION & DEV., MEASURE 49 GUIDE 4 (Mar. 7, 2008), http://www.oregon.gov/LCD/MEASURE49/docs/general/m49_guide.pdf.

102. *Id.*

103. Measure 49, *supra* note 6, at § 7(1).

104. *Id.* at § 7(2)(a).

105. *Id.* at § (7)(2)(b).

106. *Id.* at § (7)(2)(c).

in value of the property caused by a land use regulation totaled \$1 million, and the claimant filed a Measure 37 claim before June 28, 2007, requesting a waiver for ten homesites, the value of the homesites when approved cannot exceed \$1 million. According to the DLCDC, the value of the homesite is based on its current value as a developable homesite as determined by an appraisal provided by the claimant.¹⁰⁷ The loss in property value is determined by calculating the difference of value, based on an appraisal of the property value one year before the land use regulation was enacted and the value one year after the land use regulation was enacted, plus interest.¹⁰⁸

If the Measure 37 claim was based on more than one regulation enacted on different dates, then the loss of value shall be calculated separately for each land use regulation and the losses caused by each regulation will then be added together to determine the total loss.¹⁰⁹ For example, if a property owner purchased a parcel of land in 1960, at a time when there were no regulations limiting development, and subsequently in 1973, a land use regulation was enacted preventing the development of homes on the land (for reasons other than public health, safety or that required by federal law),¹¹⁰ the loss in value, if any, would be calculated by determining the value of the property in 1972, one year before the regulation was enacted, and then determining the value of the property in 1974, one year after enactment. If, after subtracting the 1974 value from the 1972 value, it is determined that a loss has occurred, the property owner may be able to move forward with the claim. If the owner's claim was based on a regulation enacted in 1973 and a second regulation in 1975, then the owner would repeat the appraisal process for the 1975 regulation and add the loss in values caused by the two regulations to determine the total loss in FMV. The total loss in FMV is then further reduced by any taxes that were not paid due to the property receiving a special farm or forest assessment, less any severance or recapture taxes paid if the property is disqualified from special assessment.¹¹¹

Additionally, the appraisal must expressly state what the highest and best use of the property was at the time the land use regulation(s)

107. DEP'T OF LAND CONSERVATION & DEV., MEASURE 49 GUIDE, *supra* note 101, at 8; *see also* Measure 49, *supra* note 6, at § 7(7).

108. Measure 49, *supra* note 6, at § 6.

109. *Id.*

110. *See id.* at § 7(5)(e).

111. *Id.* at § 7(7).

were enacted.¹¹² Thus, if the appraisal finds that residential use was not the highest and best use of the property at the time the regulation was enacted, then the claim would be disqualified.¹¹³ Factors that will determine what the highest and best use was include location, time of enactment, and other potential uses for which the property has been suited.¹¹⁴

The high hurdles set by this conditional option has led Dave Hunicutt, President of Oregonians in Action, to call it the “impossible dream,” having met only one Measure 37 claimant who appears to qualify under this option.¹¹⁵ Furthermore, if a claimant chooses the conditional option and files an appraisal, the claimant can’t then elect to choose the Express Option.¹¹⁶ Regardless of which option the claimant chooses, the state will conduct a review of the claim before issuing a final decision stating whether the claim is approved or denied and for how many homesites, if any.¹¹⁷ However, Measure 49 does not clarify exactly when the state has to make its final decision, only that claims will be reviewed as “quickly as possible, consistent with careful review of the claim.”¹¹⁸

It is apparent that Measure 49 forces the majority of claimants to proceed under the Express Option. By having to proceed under this option, development in Oregon’s rural areas will be much more limited than under Measure 37, and will have the effect of protecting high-value farm and forest lands.

2. *Property Inside the UGB*

For property inside the UGB, an owner may be able to build up to ten single-family dwellings.¹¹⁹ If the property owner has an approved or pending Measure 37 claim, development is limited to the number of dwellings approved or sought in the original claim.¹²⁰ For

112. *Id.* at § 7(7)(c).

113. *See* DEP’T OF LAND CONSERVATION & DEV., MEASURE 49 GUIDE, *supra* note 101, at 8.

114. *Id.*

115. Flynn Espe, *Hunicutt Talks Measure 49*, THE EAST OREGONIAN, Jan. 18, 2008, available at <http://www.eastoregonian.info/main.asp?SectionID=13&subsectionID=48&articleID=71953&Q=46583.5>.

116. Measure 49, *supra* note 6, at § 8(5).

117. *Id.* at § 8(4)-(7).

118. *Id.* at § 8(6).

119. *Id.* at § 9(1).

120. *Id.* at § 9(2)(a).

example, if (1) a property owner had a parcel of land within the Portland Metro UGB that was eligible for a Measure 37 claim, (2) a claim was filed before June 28, 2007 requesting approval for the construction of fifteen units, and (3) the claim met the other requirements of Measure 49, the claimant would be limited to building a total of ten units, including any pre-existing units already on the property.¹²¹

Furthermore, development is limited by the fact that the total FMV of the dwellings cannot exceed the total loss in FMV caused by the enactment of the regulation(s).¹²² The calculations of FMV are determined by using the same appraisal process used for property outside the UGB, with the main difference being that for appraisals of property outside the UGB the potential FMV of the property is determined by using the developable value of the property, whereas for property within an UGB the calculation of the potential FMV is determined by using the value of each single-family dwelling. For example, if an appraisal found that a land use regulation reduced the FMV of property outside the UGB by \$1 million and the claimant, under Measure 37, had requested just compensation in the amount of \$1 million or a waiver to construct fifteen dwelling units and was approved for that number of dwellings, then the number of dwellings that could be constructed would be limited to the FMV of approved sites not exceeding \$1 million, conditioned upon meeting the other requirements under Measure 49. Contrast this situation to that of a property owner who owns a parcel within an UGB. If the appraisal found that the property value within the UGB was reduced by \$1 million by the enactment of a land use regulation and the claimant had requested just compensation in that amount or a waiver to construct fifteen dwelling units, and was approved for such, in this instance, if the appraisal found that only two completed dwelling units would be worth \$1 million, then the property owner would be limited to constructing only two units. This will be the likely outcome of many subdivisions that were approved under Measure 37, are within an UGB, and are not found to be vested claims. This is because the value of a completed home within an UGB will typically far exceed the value of a developable lot outside the UGB.¹²³

121. *See id.* at § 9(2)(b).

122. *Id.* at § 9(2)(c).

123. Portland STATE UNIV., CTR. FOR REAL ESTATE, Q., First Q. 2008, at 45, available at http://www.pdx.edu/media/r/e/RE_Quarterly_08_1Q.pdf (median sales price of new home

Among other requirements, the owner of property within an UGB must also prove that the highest and best use of the property at the time the regulation at question was enacted was residential use.¹²⁴ Furthermore, the owner must show that the property is zoned for residential use.¹²⁵ It is the responsibility of the Metro,¹²⁶ city, or county where the property is located to review the claims that received a waiver or are still pending to make sure they meet the requirements of Measure 49.¹²⁷

3. Claims on High-Value Farm or Forest Land or Within Ground Water Restricted Areas

The restriction limiting development on high-value farm or forestland or land in an area that is considered ground water restricted, seems only to apply to claims outside an UGB.¹²⁸ Thus, if property within an UGB meets the requirements of Measure 49, subsection 9, and is considered high-value farm or forestland, then it is potentially developable. Although this represents very few of the total number of claims, it is a potential loophole in the measure for those property owners who have land designated high-value farm or forestland within an UGB.¹²⁹

4. Vesting

Although a complete discussion of the vesting issue is beyond the scope of this paper, it is an important issue created by the passage of Measure 49. Measure 49 will allow for the completion of Measure 37 projects, if the use of the property complies with the waiver and the claimant has a common law vested right to complete and continue the use.¹³⁰ However, it is unclear how much progress is necessary to have the Measure 37 claim vest and allow for completion.¹³¹ In one case, a developer of a fifty-unit subdivision in McMinnville, Oregon

in the Portland Metro region was \$350,000 at the end of the fourth quarter for 2007).

124. Measure 49, *supra* note 6, at § 9(8).

125. *Id.* at § 9(5)(e).

126. Metro is an elected regional governing body for the Portland, Oregon region.

127. Measure 49, *supra* note 6, at § 10(1)-(2).

128. *Id.* § 7(1).

129. THE INST. OF PORTLAND METRO. STUDIES, MAPPING MEASURE 37, pt. 1, Dec. 2006, at 8, available at http://www.pdx.edu/media/i/m/ims_M37atlas1.pdf.

130. Measure 49, *supra* note 6, at §5(3).

131. *Id.*; see also, *Vesting Bids Hit County*, NEWS REG., Jan. 26, 2008 (on file with author).

spent \$2.1 million in outlay to develop lots for building; however, to-date, only one house has actually been built.¹³² In a vesting application that was submitted for Measure 49 purposes, the developer concluded that 95% of the project was complete, not figuring the costs of actually building the homes, which would run much higher.¹³³ Land use planning advocates argue that in determining vesting under a Measure 49 application, it is necessary to factor in the costs of the completed homes, not just the cost to make the lots buildable.¹³⁴

In *Corey v. DLCD (Corey I)*, the Oregon Court of Appeals held that Corey, a landowner who had received a Measure 37 waiver, had a protected property interest in the waiver.¹³⁵ The court further held that they had jurisdiction for judicial review of the case.¹³⁶ The issues after *Corey I* thus become: Did individuals who obtained waivers under Measure 37 to develop their land gain a protected property interest, thus subjecting them to a taking without just compensation when Measure 49 was passed and took away that waiver? And if so, what process is due? These questions were answered by the Oregon Supreme Court, which recently issued its opinion in *Corey v. DLCD (Corey II)*.¹³⁷ The Oregon Supreme Court upheld the validity Measure 49, stating that subsection 5 deprives land owners of a vested right in the waivers, except in the limited instance where they have a common law vested right.¹³⁸ Thus, because the owners in *Corey II* had failed to prove that they had “partially completed any use described in the waiver,” they did not have common law vested right.¹³⁹ Therefore, in order for Measure 37 claimants to be able to maintain a vesting claim, they must be able to do so under common law rights of vesting as opposed to Measure 37.

132. *Vesting Bids Hit County*, *supra* note 131.

133. *Id.*

134. *Id.*

135. *Corey v. Dep't of Land Conservation & Dev. (Corey I)*, 152 P.3d 933, 938 (Or. App.2007).

136. *Id.*

137. *See Corey v. Dep't of Land Conservation & Dev. (Corey II)*, 184 P.3d 1109 (Or. 2008).

138. *Id.* at 1113 (citing *Clackamas Co. v. Holmes*, 508 P.2d 190 (Or. 1973) (describing “vested rights”).

139. *Corey II*, 184 P.3d at 1114.

D. New Claims

The second part of Measure 49 addresses new claims, “which may be based on land use regulations enacted only after January 1, 2007.”¹⁴⁰ In keeping with Measure 37, Measure 49 also provides either compensation or waivers for new land use regulations that restrict property use.¹⁴¹ However, Measure 49 only provides relief in the case where a regulation limits residential uses of property or restricts farming or forest practices.¹⁴² Thus, it is much more narrow in scope than Measure 37. Furthermore, Measure 49 claimants must demonstrate that the new regulations have reduced the value of the property.¹⁴³ Similar to the restriction placed on Measure 37 claims, new residential claims under Measure 49 are provided relief only to the extent necessary to allow additional residential development of a value comparable to the value lost as a result of the regulation.¹⁴⁴ A further limit on new claims requires that they be filed “within five years after the date the land use regulation was enacted.”¹⁴⁵

V. OREGON’S LAND USE LAWS: THE NEED FOR GOVERNMENTAL REGULATION

A. *How and Why We Regulate Land Use: The Property Conflict in American Society*

Since the founding of the United States, the idea of private property ownership in America has been a hotly disputed concept. On one side of the debate were James Madison and his idea that, “[g]overnment is instituted no less for the protection of property, than of the persons, of individuals.”¹⁴⁶ On the other side, were Benjamin Franklin and his notion that, “[p]rivate property is a creature of society, and is subject to the calls of society whenever its necessities require it, even to the last farthing.”¹⁴⁷ Notably, the Declaration of Independence does *not* promise the Lockian notion of “life, liberty

140. Measure 49, *supra* note 6, at § 12(1)(c).

141. *Id.* at §12(5)(a)-(b).

142. *Id.* at §12(1)(b).

143. *Id.* at §12(1)(d).

144. *Id.* at §12(2).

145. *Id.* at §13(4).

146. THE FEDERALIST NO. 54 (James Madison).

147. 1 THE FOUNDERS’ CONSTITUTION ch. 12, doc. 25 (2000), <http://press-pubs.uchicago.edu/founders/documents/v1ch12s25.html>.

and property”—rather, it proffers “life, liberty and the pursuit of happiness.”¹⁴⁸ Nevertheless, regardless of what the Framers intended, Americans have traditionally viewed land as “a commodity to be bought and sold, used and depleted by its owner as he sees fit, with a minimum of governmental involvement or guidance.”¹⁴⁹ Early land policy in the United States was based on the premise that limited government interest should protect property values and should be carried out by local governments, with state involvement limited to enacting enabling legislation for the local governments to carry out regulations.¹⁵⁰ In the 1970s, a growing recognition among the states began to emerge of the problems created by the traditional attitude of land use policy.¹⁵¹ One such problem was the disappearance of rural and agricultural land due to the development associated with urban sprawl.¹⁵² The problems were compounded by a lack of comprehensive planning and coordination.¹⁵³ As an outgrowth of this emerging recognition of the problems associated with unchecked urban growth, individuals, communities, and governments began to question the traditional notions of land use and development; these stakeholders increasingly sought to include into the equation the impact urban growth would have on their quality of life, by

148. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

149. S. COMM. ON INTERIOR & INSULAR AFFAIRS, LAND USE POLICY AND PLANNING ASSISTANCE ACT, S. Rep. No. 93-197, at 72 (1973).

150. THE COUNCIL OF STATE GOV'TS, LAND: STATE ALTERNATIVES FOR PLANNING AND MANAGEMENT, 3-4 (1975) (indicating that “controls over land use, such as zoning, building codes, and subdivision regulations, were devised and applied in ways which insured that” the traditional concept of land as a commodity and infinitely available and durable resource would survive.); *see also* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding the use of State police power to zone); JURGENSMEYER & ROBERTS, *supra* note 8, at 2 (land use planning only began to emerge as a separate area of the law in the 1920s).

151. *See* FREILICH, *supra* note 1.

152. *Id.* at 2-3. (Estimating a yearly loss of 1.5% of prime agricultural land in the U.S. The effect of losing agricultural land to sprawl will mean a “diminishment of domestic and export food capacity, the destruction of rural and open space environments, the stimulation of wasteful expenditures of scattered capital improvement with concomitant fiscal inefficiencies and the increase of energy utilization”). Whereas in Oregon, due to the land use planning scheme, losses of agricultural land was kept to only 1% for the entire period of 1982-1987. *See* MEASURE 37 IMPACT STUDY, *supra* note 70, at 1.

153. *See* FREILICH, *supra* note 1, at 4-6 (“The lack of comprehensiveness and coordination in land use planning has been accompanied by serious development problems and abuses of land and natural resources.” Furthermore, these “extensive failures of existing land use planning . . . can be traced to . . . [t]he shortcomings of a concept of land ownership and the public interest in private use of land which is not consistent with current realities [and] are compounded by inadequate technical bases for decision-making and inept or improper administration of regulations.”).

recognizing the fact that land was a finite resource.¹⁵⁴ The question of why we regulate land use in Oregon is a continuation of this nationwide argument for greater governmental control in land use planning.

An individual opposed to government controlled land use planning would argue that land use planning should be geared towards the protection of the individual landowner and that market forces should determine how the owner uses the land.¹⁵⁵ Thus, in order to answer the quality of life question, government-imposed barriers to development of private land should be removed so that the individual can achieve the highest quality of life. This viewpoint is termed the “proacquisitive position,”¹⁵⁶ where property rights are thought to derive from natural law.

In contrast, those in favor of government regulated land use planning would argue that regulations are necessary to advance the health, safety, and welfare of the community as a whole, and that protection of land as a finite resource is necessary to ensure the quality of life, and regulations should be drafted to determine how a landowner uses the land to advance these interests.¹⁵⁷ This viewpoint is termed the “prosocial position,” where property rights are said to exist, “because the law says they exist and the law controls because it has coercive power behind it.”¹⁵⁸ Under this theory, the “ownership of property is not absolute or immutable but a changing concept, constantly redefined to permit ownership of property to fill whatever role society assigns it at a given time.”¹⁵⁹

Presently, the battle of these two conflicting viewpoints continues in Oregon, without either side gaining any clear advantage. One commentator highlighted the consequences that may result from minimizing governmental regulations on private property: “our cultural and historical resources,” may be impaired, and “devastate

154. *See id.* (proposing that land should be viewed as a basic natural resource and not merely an economic commodity to be consumed as quickly as possible, and that the public has substantive interests in the ways in which this resource is conserved and utilized).

155. PLATT, *supra* note 7.

156. JURGENSMEYER & ROBERTS, *supra* note 8, at 406 (the proacquisitive position “favors individual wealth” and is represented on the Supreme Court by Justice Scalia).

157. *Id.*

158. *Id.* at 406–07 (the prosocial position “argues for supremacy of the common good”).

159. *Id.* at 406 (arguing that an “individual has an obligation not to use property in violation of the public right”).

our natural resources, upsetting critical ecological balances.”¹⁶⁰ However, minimizing private property rights “may mean destabilizing investment in land and eroding individual liberties. And yet, maximizing private rights may cause further inequality of wealth.”¹⁶¹ As the legal issues of Measure 49 are hashed out in the courts, it is important for the broader role that land use planning plays in the sustainability discussion not to be forgotten.¹⁶²

1. What Is Comprehensive Planning?

Land use planning first emerged as a way to plan frontier settlements in early colonial days and later as means to comprehensively address the health problems created by the growth of American cities.¹⁶³ In addition, planning was utilized to make physical improvements to beautify cities.¹⁶⁴ A comprehensive plan is designed to serve “as an overall set of goals, objectives, and polices to guide the local legislative body in its decision making in regard to the physical development of the community.”¹⁶⁵ These plans then serve as the basis for regulations enacted by local governments as an exercise of their police power.¹⁶⁶ In the majority of states, local governments are not required to create plans, and the comprehensive plan is treated as just a “policy document without the force of law.”¹⁶⁷ Oregon is one of few states to have enacted alternative systems for land use law by utilizing the comprehensive plan.¹⁶⁸ Oregon’s system of state oversight of local control and development is one alternative to zoning, the primary tool used in most states for land use control. Another alternative comes from the proponents of a market control

160 *Id.* at 408 (internal citations omitted).

161 *Id.* (internal citations omitted).

162. See Russell James, *Whose Property Rights?*, METROPOLIS OBSERVED, Mar. 19, 2008, <http://www.metropolismag.com/cda/story.php?artid=3230> (quoting Eric Stachon of 1000 Friends: “Land-use planning plays an important role in reaching the greenhouse-gas-reduction goals the state has set.”).

163. JURGENSMEYER & ROBERTS, *supra* note 8, at 16–21.

164. *Id.* (the colonial planning era, the sanitary reform movement, and the city beautiful movement).

165. *Id.* at 27 (citing WILLIAM I. GOODMAN & ERIC C. FREUND, PRINCIPLES AND PRACTICE OF URBAN PLANNING, 349 (1968) (defining comprehensive plan as “an official public document preferably (but often not) adopted as law by the local government as a policy guide to decisions about the physical development of the community”)).

166. *Id.* at 27.

167. *Id.* at 31.

168. PLATT, *supra* note 7, at 350 (Oregon, Vermont, Florida, and Hawaii have adopted state-wide land planning laws.)

system who argue for deregulation.¹⁶⁹ Both of these alternatives recognize that zoning has been unable to “deal with the explosion of land use development . . . and the environmental effects of intense development.”¹⁷⁰ Today, land use plans are a means to combat urban sprawl.¹⁷¹ Sprawl is the catalyst for other major natural resources crises such as environmental degradation, the loss of agricultural and forest lands, and the over-consumption of fossil fuels, which has been proven to contribute to global warming.¹⁷²

2. Market Control of Land Use

Under the market control system, which relies on the economics of supply and demand, the decision of whether or not to develop land is left largely to the individual landowner and the influences of the market. Thus, a landowner who owns agricultural property that is desired in the market for the purpose of residential development is going to find that the land is presently more valuable, in a purely economic sense, than it is for the purpose of farming.¹⁷³ Assuming that the landowner is influenced solely by profit seeking motives, the landowner would choose to sell the land to the developer or, in the alternative, choose to develop the land himself or herself, so long as the profits from the development exceed the profit that could be made by continuing to utilize the land for agricultural purposes.¹⁷⁴ This is exactly what occurred in the run-up to the passage of Measure 37. Market forces at the time Measure 37 was passed greatly favored the development of high-value farm and forest lands for the purpose of residential development over the continued use of the land for agricultural purposes.¹⁷⁵ Proponents of the measure argued that landowners should be able to develop their land as a means to provide

169. JURGENSMEYER & ROBERTS, *supra* note 8, at 62 (citing Jan Krasnowiecki, *Abolish Zoning*, 31 *Syr. L. Rev.* 719 (1980)).

170. *Id.* at 43 (zoning is an exercise of the State’s police power to enact laws to promote the health, safety, morals, and general welfare which was traditionally delegated to local governments.); *see also* *Fasano v. Bd. of County Comm’rs*, 507 P.2d 23 (Or. 1973) (holding that the state’s planning act required that zoning ordinances and decisions be consistent with the adopted comprehensive plan.).

171. FREILICH, *supra* note 1, at 15–16.

172. *Id.* at 16.

173. PLATT, *supra* note 7, at 109.

174. *Id.*

175. *See* Measure 37, *supra* note 3, at § 2(b).

for their quality of life, so long as there were buyers who were willing to purchase the property.¹⁷⁶

Opponents of the market control model of land use planning cite several problems with this theory. Most importantly, opponents point out that the market theory fails to take into account externalities.¹⁷⁷ The decision to convert high-value farm and forest lands for the purpose of residential development can have harmful and often irreversible effects.¹⁷⁸ Land use planners note that the loss of agricultural and forest lands to residential development ultimately ends up costing the farmers, timber managers, and taxpayers more.¹⁷⁹ Some of the external costs associated with development of these lands, which are typically outside any metropolitan areas, are adverse impacts both on the environment and the quality of life, in terms of social impact caused by population growth.¹⁸⁰ Environmental concerns that come to light when land is developed range from increased light, air, noise, and water pollution to the encroachment of wildlife habitat, and loss of wetlands.¹⁸¹ Social concerns can include an increase in crime, and an unbearable stress on limited local resources such as, schools and hospitals, not to mention an increase in traffic and thus an increased burden on local utilities, infrastructure, and law enforcement.¹⁸² In addition, there are impacts on the availability of affordable housing, employment opportunities, and generally negative impacts on the community.¹⁸³ By failing to take into account such externalities of development, it is argued that when the free market controls the land use planning process, the true costs of development are not taken into consideration in the sales price and the burden of paying for the externalities is shifted from the buyer and seller to the community.¹⁸⁴

176. Yes on 37, Why Oregon Needs Measure 37, <http://measure37.com/why.htm> (last visited Nov. 22, 2008).

177. James L. Huffman, *Land Ownership and Environmental Regulation*, 25 *ECOLOGY L.Q.* 591, 594–95 (1999).

178. OR. DEP'T OF LAND CONSERVATION & DEV., 2005–07 BIENNIAL REPORT TO THE 74TH LEGISLATIVE ASSEMBLY 14–15 (2007), available at http://www.oregon.gov/LCD/docs/publications/2005-07_biennial_report.pdf [hereinafter 2005–07 BIENNIAL REPORT]; FREILICH, *supra* note 1, at 280.

179. 2005–07 BIENNIAL REPORT, *supra* note 178, at 14–15.

180. FREILICH, *supra* note 1, at 16.

181. *Id.*

182. *Id.*

183. *Id.*

184. Huffman, *supra* note 177 at 594–95.

Alternatively, opponents of government regulation of land use argue that the market will best serve the interests of the public.¹⁸⁵ This “proacquisitive” camp argues that, “markets will assure that resources are committed to their most valued use.”¹⁸⁶ However, the problem with this view is that the “most valued use” of land is not necessarily the best use of the land. As discussed earlier, a certain parcel of farmland may receive a higher value as residential property because market forces favor development over farming; however, this short-term thinking fails to take into account the long-term impacts associated with the development of that land. This can be seen in the post-Measure 37 era, when owners of land that was suddenly deemed developable quickly sought to capitalize on the change in law with little regard for the environmental and social impacts of their choices. The proacquisitive advocates also argue that private rights serve the goal of generating wealth, thereby furthering environmental protection and other social goals.¹⁸⁷ However, the reality is that unregulated urban growth leads to greater poverty concentrated in urban areas; social resegregation; an increased impact on the environment; unaffordable housing and fewer employment opportunities.¹⁸⁸

3. State Control of Land Use Planning

Generally, the source of power for public land use controls stems from the state’s exercise of its police power.¹⁸⁹ The police power enables the state to enact laws for the purposes of promoting the health, safety, and general welfare.¹⁹⁰ This power to regulate land use can be delegated to local governments.¹⁹¹ Typically, the power is conferred through a zoning enabling act, such as the Standard State Zoning Enabling Act (SZEA) of 1924, the Standard City Planning Enabling Act (SPEA) of 1928, or the Modern Land Development Code (MLDC) of 1976.¹⁹² The purposes of the first two enabling acts were to provide power for planning at the level of local government

185. *Id.* at 599.

186. *Id.* at 600 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 45 (3rd ed. 1985)).

187. *Id.*

188. FREILICH, *supra* note 1, at ch. 2.

189. JURGENSMEYER & ROBERTS, *supra* note 8, at 46.

190. *Id.* at 47.

191. *Id.*

192. *See id.* at 47–64.

and to define the purposes of zoning and its scope.¹⁹³ The MLDC was the driving force to modernize the land development process and the backbone of the Quiet Revolution.¹⁹⁴ The MLDC's main advancement of development regulation was Article 7, "which proposed state review and possible override of local zoning decisions concerning (1) areas of particular concern, (2) large-scale developments, and (3) developments of regional benefit."¹⁹⁵ The MLDC's Article 7 provided the underlying theory that Oregon would use in its state land use planning laws.¹⁹⁶ These acts were established on the theory approved by the U.S. Supreme Court, that the Constitution is not violated by states when they or their local governments exercise the police power through zoning or other land use regulations that have the effect of diminishing the value of a private landowner's property.¹⁹⁷ The Supreme Court's approval of regulation of private use of land or economic activity, which was a threat to the public interest, stretches back to the 1800s. In 1887, the Court in *Mugler v. Kansas*, stated:

A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community, cannot, in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purpose nor restrict his right to dispose of it.¹⁹⁸

This broad approval of a state's exercise of its police powers to regulate land use stands in stark contrast to Measure 37, which provides more state protection in the area of regulatory takings than the U.S. Constitution provides.¹⁹⁹

One commentator has pointed out the following benefits that land use planning provides:

A vision to prepare for "what if" scenarios.

A blueprint to direct how the city should grow.

193. *See id.*

194. PLATT, *supra* note 7, at 349.

195. *Id.*

196. *Id.*

197. *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

198. *Mugler v. Kansas*, 123 U.S. 663, 667-68 (1887) (upholding a Kansas state law, which prohibited the manufacture and sale of alcoholic beverages and also closed existing breweries).

199. *See* GOV. TED KULONGOSKI, 2004 OREGON BALLOT MEASURE 37, *supra* note 62, at 5 (noting that many of Oregon's zoning laws would be regarded as laws that restrict the use of private property under Measure 37, thus causing a taking requiring just compensation).

A moderate guide for future direction and a policy statement.

A remedy for an existing problem such as slums, or housing, or racial tension.

A process to create checks and oversight on development by citizens and government bodies.

A streamlined checklist and framework for pre-approved development.

A response to state or federal mandates, particularly environmental mandates.²⁰⁰

Because many land use planning decisions, such as zoning, had the capacity to trigger a Measure 37 claim, this had the effect of chilling the ability of the state land use planners to properly enact and enforce Oregon's land use planning goals.²⁰¹ The long-term effect of this inability to enforce land use regulations would have been a blow to Oregon's ability to protect its environment and valuable natural resources. To advocates of regulated land use, "[t]he property rights movement is viewed as anti-environmental and the Takings Clauses of the federal and state constitutions are seen as barriers to effective implementation of environmental laws."²⁰² In contrast, opponents to government-regulated land use planning suggest that deregulation of land use controls would serve as a better protector of the environment through the private property owner gaining a more vested interest in the property, thus causing the owner to better care for the property and its future, as opposed to someone who has just a general interest in the land.²⁰³

B. How and Why Oregon Regulates Land Use

One of Oregon's major successes of land use laws in the past decades has been the passage of agricultural and forest protection regulations that have had the effect of containing urban growth while at the same time protecting valuable farm and forest lands from conversion into residential housing.²⁰⁴ However, it can be argued that this policy of containing urban growth had an unintended

200. William C. Baer, *General Plan Evaluation Criteria: An Approach to Making Better Plans*, 63 J. AM. PLAN. ASS'N 329 (1997).

201. MEASURE 37 IMPACT STUDY, *supra* note 70, at 4–6.

201. *Id.* at 4.

202. Huffman, *supra* note 177, at 599.

203. *Id.* at 600–01.

204. See PLATT, *supra* note 7, at 484.

consequence of contributing to a spike in housing prices, thus creating a windfall for landowners who were able to develop their land while causing wipeouts for landowners who could not develop.²⁰⁵ Because developers were limited to building housing developments within the UGBs on land already dedicated to that purpose, it quickly became apparent that in order to capitalize on the booming housing market a change in Oregon's land use policy would have to be made. In the early 2000s, as housing prices in Oregon's urban areas were reaching record highs, private property owners of high-value farm and forest lands in and around the UGBs put on a campaign articulating their inability to convert their land for housing purposes so as to cash in on the housing boom as a taking by the government of their property rights.²⁰⁶ Oregon voters bought the story hook, line, and sinker and passed Measure 37 to ensure that the old farmers pictured in the ads would be able to have a secure retirement. What the voters failed to realize is that Oregon's involvement in the "Quiet Revolution" of the 1970s was a monumental step forward in the land use regulation process, and the real people behind the measure were large developers. Furthermore, Measure 37 provided private property owners more protection in the area of regulatory takings than is provided under U.S. constitutional law.²⁰⁷ Commentators wondered if Oregon's property protection measure would destroy the growth management plans and comprehensive planning that Oregon had set in place, thus causing society as a whole to suffer as a result.²⁰⁸

By taking the planning process away from local governments, the state is able to focus on the core purposes of land use planning: protecting the public health, safety, and welfare of Oregonians. However, in protecting the housing values of Oregon's urban areas

205. See JURGENSMEYER & ROBERTS, *supra* note 8, at 64–66 (defining a windfall as an increase in the value of land due to actions from government such as the imposition of restrictions on other land, and a wipeout as any decrease in value of real estate other than one caused by the owner or by general deflation).

206. See FREILICH, *supra* note 1, at 279.

207. See *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) (regulations that diminish the value of a landowner's property, are constitutional, so long as the regulation is done for a legitimate purpose, which is rationally related to a legitimate government interest such as health, safety and general welfare.); See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

208. Compare JURGENSMEYER & ROBERTS, *supra* note 8, at 7 (arguing that, "the limitation of rights to use property should not be equated with essential freedoms such as speech, press, and religion."), with Ronald J. Krotoszynski, *Fundamental Property Rights*, 85 *Geo. L.J.* 555 (1997) (arguing that property rights should be considered no less important than liberty rights).

through the zoning of high value farm and forest land as undevelopable for commercial or residential purposes, the effect undeniably has been to reduce the property values of those lands and limit those property owners. The issue has thus become: is the reduction in value caused by such a land use regulation enacted after the owner of private property acquired the land a taking for public benefit within the scope of the Fifth Amendment? Measure 37 advocates said yes.

C. The Takings Issue

1. An Overview

While a thorough discussion of the takings issue is beyond the scope of this paper, several important issues must be addressed. The Fifth Amendment to the Constitution of the United States provides that, “nor shall private property be taken for public use, without just compensation.”²⁰⁹ This brief phrase has been hotly debated, especially since the Supreme Court initially issued land use decisions in the last decades of the twentieth century that restricted government regulation by expanding the regulatory takings doctrine, before stepping back with more recent decisions.²¹⁰ However, the questions of (1) what is the “property” interest at issue and (2) when is property “taken” by regulation still create troublesome abstractions and ambiguities when applied to regulations of the use of private land in the interests of both the owner and the general public. The state’s ability to answer these questions is crucial in determining how the development and use of land can successfully be regulated through police power actions.

The doctrine of regulatory takings deals with the issue of whether the government effects a taking when it enacts a regulation that impacts private property, and whether the Fifth Amendment requires just compensation to be paid. The Court has said the main idea of the Fifth Amendment is to prevent government “from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²¹¹ Whereas the

209. U.S. CONST. amend. V.

210. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005).

211. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

function of the regulatory takings doctrine is “to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property.”²¹²

2. *Is a Measure 37 Claim “Property”?*

The first issue that needs to be addressed in the takings analysis is whether or not the taking was of private “property.”²¹³ There is no doubt that land use regulations enacted by the government impact property within the meaning of the Fifth Amendment.²¹⁴ A contentious issue created by Measure 49 was whether the property owners who received a waiver under Measure 37 had a property interest created by the waiver itself. According to the Oregon Court of Appeals in *Corey I*, the answer was yes, they did have a property interest²¹⁵—the property interest being an interest “in a waiver of regulations that will result in an expansion of permissible uses of their land.”²¹⁶ On review, the Oregon Supreme Court determined that the passage of Measure 49 invalidated Measure 37 claims and thus deprived the owners of any property right that would be recognized by a court, except in the limited situation where the owner had a common law vested right.²¹⁷ Thus, looking beyond Measure 37 at Oregon’s land use planning laws, which do impact property interests, the next question becomes, was there a taking?

3. *Regulatory Impacts as Takings: Penn Central*

The U.S. Supreme Court has long recognized the authority of a state to regulate land use under its police power and that such authority extends to the ability to limit private development.²¹⁸ In describing the police power of the states, Justice Douglas noted that,

212. *Lingle*, 544 U.S. at 529.

213. U.S. CONST. amend. V.

214. See Measure 49, *supra* note 6, at § 2(14) (Measure 49 provides just compensation for specified land use regulations, including Oregon’s land use planning goals).

215. *Corey v. Dep’t Land Conservation & Dev. (Corey I)*, 953 P.3d 933, 935 (Or. App. 2007).

216. *Id.* at 937–38 (finding that the DLCD created an entitlement to benefits “when it accepted petitioners’ Measure 37 claim,” and therefore, they have a “protected property interest” in the waivers. Thus the DLCD was required to provide “notice and a meaningful hearing” before it denied the waivers. (citing *Londoner v. Denver*, 210 U.S. 383, 386 (1908)).

217. *Corey v. Dep’t Land Conservation & Dev. (Corey II)*, 184 P.3d 1109, 1113–14 (Or. 2008).

218. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 843 (1987) (Brenan, J., dissenting) (citing *Agins v. Tiburon*, 447 U.S. 255 (1980) (scenic zoning); *Penn Cent. Transp. Co. v. New*

[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious, as well as clean, well-balanced as well as carefully patrolled.²¹⁹

In determining whether a land use regulation serves a proper governmental interest, the Supreme Court has been highly deferential to the legislature, and generally presumes such regulations are valid.²²⁰ However, the argument for providing just compensation for a governmental regulation is premised on the idea that it is a necessary check on the government to prevent the extinction of private property ownership.²²¹ As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, “while a property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.”²²² In *Penn Central Transportation Co. v. New York City*, the Supreme Court came up with an ad hoc test that involved factual inquiries to determine when an individual was entitled to just compensation for a regulation enacted by the government that caused economic injury.²²³ In *Penn Central*, the Court concluded that the city’s declaration of Grand Central Station as a historical landmark, which prevented the building of an office complex above it, was not a taking because it left the station exactly as it had been, it did not amount to a physical invasion of the property, and it did not interfere with the original investment-backed expectations of the owners.²²⁴

If the regulation’s economic impact is less than a total taking, the *Penn Central* test is applied to determine whether a taking has occurred.²²⁵ In the case of Oregon’s land use planning laws that were

York City, 438 U.S. 104 (1978) (landmark preservation); *Goreib v. Fox*, 274 U.S. 603 (1927) (building line setbacks); *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387 (1926) (comprehensive zoning).

219. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (upholding an urban renewal plan for the District of Columbia).

220. PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, *LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW* 8–9 (2d ed. 2003).

221. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (mineral rights).

222. *Pa. Coal*, 260 U.S. at 415.

223. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (listing three factors for consideration: (1) the economic impact on the claimant, (2) the extent to which the regulation interfered with investment-backed expectations, and (3) the character or extent of the government action).

224. *Id.* at 137.

225. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

called takings under Measure 37, it is unlikely that the owner would be deprived of all economical viable use of the land.²²⁶ Therefore, assuming that Oregon's goal of fostering livable, sustainable development in urban and rural areas while protecting valuable natural resources²²⁷ in enacting comprehensive planning legislation is a valid use of its police powers,²²⁸ the issue then shifts to whether such a regulation is a burden too unreasonable for the individual landowner alone to bear.²²⁹

Whether the economic impact of a regulation is unreasonable is based on the property owner's reasonable investment-backed expectations and whether any economically viable use for the property remains.²³⁰ In *Penn Central*, the Court found that the railroad's primary use of the station as a terminal for sixty-five years was unaffected by the landmark designation, and therefore, the railroad's belief that it had a property right in the air above the station was not a "distinct investment-backed expectation."²³¹ Notably, the Court in *Lucas v. S.C. Coastal Council* said that, when an individual buys property, the owner "necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."²³²

In the case of Oregon's land use regulations, the state has used its police powers to protect valuable natural resources. This has the effect of limiting development of land; however, it is clear that the landowner is left with some economic use of the land. The owners can still use the property for farming or for other agricultural uses, such as vineyards. Whether the regulations defeat the owner's reasonable investment-backed expectations is the sticking point. At issue is the idea that the land owners obtained a property interest in the waivers obtained by Measure 37. Therefore, Measure 49, by either restricting or taking away those waivers, defeats the owners'

226. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Palazzolo*, 533 U.S. 606 (rejecting the argument that a 93.7% diminution in value was a categorical taking).

227. OR. REV. STAT. § 197.175 (2005).

228. See *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (holding that a law that takes property to promote a public purpose cannot be invalidated under the Fifth Amendment).

229. *Palazzolo*, 533 U.S. at 627.

230. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (referring to "reasonable," as opposed to "distinct," investment backed expectations.)

231. *Penn Cent. Transp. Co.*, 438 U.S. at 135–38.

232. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

reasonable investment-backed expectations. Land owners impacted by the regulations who had purchased their land prior to the enactment of Oregon's comprehensive land use plan could also argue that, when they purchased the land, they did so with the expectation that they would be able to develop it in the future. Opponents would argue that the owners could continue using the land as they have for the past four decades, not unlike the situation in *Penn Central*, and therefore, the owners could not have a reasonable investment-backed expectation in developing their land.²³³ Notably, this argument does not take into account the owner's interest in protecting his or her private property rights.²³⁴ However, the proacquisitive position fails to take into account the needs of society as a whole by not recognizing that land is a basic natural resource, which is finite, and that the public has substantive interests in the ways in which this resource is conserved and utilized that have long been recognized by the Court as a proper use of the state's police powers when restricting development through regulations.

The basic purpose of Oregon's statewide planning program is to sustain and enhance the quality of life in Oregon.²³⁵ This is a monumental task for an agency to undertake. Oregon's solution to this problem was the implementation of a statewide planning regime that rested on nineteen planning goals.²³⁶ Despite recent growth in the high-tech industries, Oregon's natural resources are still a vital component of the economy, and protecting these high-value farm and forest lands is a key component in supporting Oregon's economy.²³⁷ In 2005, Oregon's agricultural impact on the economy exceeded \$12 billion, and such a robust industry requires a lot of land.²³⁸ However, land use planners recognize the threat of the loss of this high-value land caused by housing development in Oregon's agricultural areas as one of the biggest concerns facing the industry and planners.²³⁹ Due

233. See THE INST. OF PORTLAND METRO. STUDIES, *supra* note 58 (indicating that the majority of Measure 37 claims were on lands zoned for "exclusive farm use," "forest use," or "farm-forest use.").

234. See Yes on 37, *supra* note 176 (arguing that Measure 37 protected private property rights, a basic civil right in a market-based economy).

235. 2005-07 BIENNIAL REPORT, *supra* note 178, at 3 (defining quality of life as "some combination of bountiful natural resources, livable communities, affordable housing, a robust economy, clean air and water, and efficient, low-cost public services.").

236. See *id.*

237. *Id.* at 14.

238. *Id.* at 14 (citing Or. Dep't of Agric., 2005 statistics).

239. *Id.* at 14-15.

to the important role that Oregon's natural resources play in the state, it is vital that land use planners be able to look at the long-term picture in creating and enforcing regulations that protect these lands from development. By looking at the issue in terms of individual gains as opposed to overall public benefit, opponents of government land use regulations fail to take all of the problems associated with land use and development into consideration, when wanting to develop high-value farm and forest lands for residential use. Private property rights, while important, have throughout history existed subject to the greater good of society. Forcing the state to pay just compensation for regulations enacted under valid use of its police power, as Measure 37 required, thus sets a higher bar than even the U.S. Supreme Court would require, and is bad policy for society as a whole.

VI. THE FUTURE OF LAND USE PLANNING IN OREGON

A. *The Need for Sustainability*

In the U.N. publication *Our Common Future*, sustainable development was defined as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."²⁴⁰ In 2001, the Oregon Legislature enacted the Oregon Sustainability Act which defines sustainability as "using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives."²⁴¹ Either way the term is defined, sustainability encompasses the idea of integrating the concepts of economic and environmental concerns at a societal level as opposed to focusing on individual values.²⁴²

While proacquisitive advocates argue that government regulatory schemes are unnecessary to further the goals of protecting natural resources in the public interest and that a free market system is a better protector of the environment, this viewpoint fails in reality.²⁴³

240. THE WORLD COMM'N ON ENV'T & DEV., *OUR COMMON FUTURE* (1987), available at <http://www.un-documents.net/wced-ocf.htm>.

241. H.B. 3948, 71st Leg. Assem., Reg. Sess. (Or. 2001).

242. SUSAN L. SMITH, *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law* 31 WILLAMETTE L. REV. 261, 262 (1995).

243. See Huffman, *supra* note 177.

As seen in the post-Measure 37 era, when left to a market largely devoid of development restrictions, private property owners paid little heed to the environmental consequences of their decision to develop. Rather, the owners of private property sought to generate as much wealth as possible. While advocates of the free market may argue that the generation of wealth is in the best interest of environmental protection, the reality is that high-value natural resource land, once developed, is difficult to reclaim. Additionally, the environmental and social consequences of unchecked urban growth far outweigh the benefits gained in a free market. In order to protect valuable natural resources for current and future use, the government is required to balance the competing needs of the private property owner against the interest of the society as a whole. Sustainable development is the best solution to these competing interests because it integrates “economic and environmental concerns” as its controlling policy objective, as opposed to requiring them to “be balanced against each other.”²⁴⁴ Therefore, it is necessary that, in any future changes to the current land use system, the decision makers integrate sustainable development into any land use planning model adopted. In fact, sustainability has been made a requirement in Oregon land use planning.

In a 2003 Executive Order issued under the authority of the Sustainability Act, Oregon Governor Ted Kulongoski ordered various state agencies, including the DLCD, to come up with a plan to ensure their department was in compliance with the Act so that Oregon could become a more sustainable state.²⁴⁵ In response to this initiative, the DLCD shifted its focus from conserving lands to economic development.²⁴⁶ This was done by making lands more readily available for industrial and other job related development.²⁴⁷ However, following the 2004 passage of Measure 37 and the 2005 executive decision to conduct a comprehensive review of the statewide planning program, it appears that the DLCD may be

244. Smith, *supra* note 242, at 263.

245. Exec. Order No. 03-03 (Or. 2003), *available at* http://www.sustainableoregon.net/execOrder/sustain_eo.cfm (stating “[t]he agency’s Plan shall include appropriate performance measures, and a strategy for meeting the Sustainability Guidance that is incorporated into the agency’s 2- and 6- year strategic plans.”).

246. OR. DEP’T LAND CONSERVATION & DEV., SUSTAINABILITY PLAN 3 (Feb. 2004), *available at* <http://www.oregon.gov/LCD/docs/publications/sustplan.pdf>.

247. *Id.* (adopting four sustainability goals: (1) Promote Sustainable Development, (2) Streamline the State Land Use Planning Process, (3) Secure Oregon’s Natural Resource Legacy, (4) Employ Sustainable Practices in Daily Operations).

struggling to implement sustainable development practices. The question to be answered is whether the Big Look Task Force, which is conducting a comprehensive review of Oregon's statewide land use planning program, will adequately address the need of incorporating sustainable development into any proposed changes to the state's land use planning program.²⁴⁸

B. The Big Look Task Force

In 2005, Oregon decided to conduct a comprehensive review of its statewide planning program to determine if any changes were necessary.²⁴⁹ The Big Look Task Force is looking at six key issues and will make recommendations to the 2009 Legislature.²⁵⁰ In the Task Force's Preliminary Findings Report, one of the first issues brought to light is the fact that Oregon's nineteen planning goals are really more like policies; the Task Force recommended simplifying the system with just four broader goals.²⁵¹ Interestingly, the Task Force concluded that adopting these four goals "will help create a sustainable Oregon."²⁵² However, outside of its mission statement, which states "[t]he mission of the Oregon Big Look Task Force is to make recommendations to ensure that the state's land use system sustains the quality of our environment and the beauty of our landscape while building an economy that assures the prosperity of Oregon's citizens and communities," nowhere does the Task Force give serious consideration to what sustainable development is and how it should be integrated into the land use planning scheme.²⁵³

248. See S.B. 82 § 1, 73d Leg. Assem., Reg. Sess. (Or. 2005), available at <http://www.leg.state.or.us/05reg/measpdf/sb0001.dir/sb0082.en.pdf>.

249. *Id.* (creating a 10-member task force of individuals "knowledgeable about Oregon's land use system and who are familiar with Oregon's economic and employment base.").

250. See THE BIG LOOK TASK FORCE, PART ONE EVALUATION REPORT (June 2007), available at http://centralpt.com/upload/301/2458_BLTF%20Final%20Report%206_29_07.

pdf (identifying six issues addressed by the Big Look Task Force: (1) the role of state and local government, (2) citizen involvement, (3) economy, (4) growth management, (5) Infrastructure Finance and Government, (6) Benefits & Burdens).

251. See THE BIG LOOK TASK FORCE, PRELIMINARY FINDINGS AND RECOMMENDATIONS 6 (July 2007), available at http://centralpt.com/upload/301/2528_Big_Look_stakeholderbrochure.pdf (recommending four goals: (1) Providing a healthy environment; (2) Sustaining a prosperous economy; (3) Ensuring a desirable quality of life; (4) Maintaining a system that is fair and equitable).

252. *Id.* at 12 (finding that the existing goals are actually "tools, strategies, and tactics rather than true goals").

253. THE BIG LOOK TASK FORCE, PART ONE EVALUATION REPORT, *supra* note 250, at 6.

Because the Task Force has not taken the time to define what sustainable development is, it will not be able to “effectively use sustainable development as the guiding principle for making development, environmental, and natural resource management decisions,”²⁵⁴ as is required by Senate Bill 82.²⁵⁵

While the Task Force has recommended that Oregon’s land use planning program should include the goals of (1) a “healthy environment,” (2) a “prosperous economy,” (3) ensuring “a desirable quality of life” and (4) maintaining a “system that is fair and equitable,”²⁵⁶ these concepts have been separated out by the Task Force as opposed to being considered holistically under the concept of sustainable development.²⁵⁷ In order to be an effective guide for development, sustainability must be “conceptualized as a binding constraint on the maximization of the quality of life of the present generation. That constraint then can be expressed as a requirement of law and policy that we maintain a non-declining stock of natural capital.”²⁵⁸ A non-declining stock of natural capital includes the following elements:

- (1) Waste should be released into the environment commensurate with the assimilative capacity of the environment;
- (2) preservation of biodiversity;
- (3) the utilization of renewable resources at a rate less than their rate of regeneration; and
- (4) optimize nonrenewable resources by efficient use and improved technology, and by

254. Smith, *supra* note 242, at 282 (“Precision in defining sustainable development is essential to effectively use sustainable development as the guiding principle for making development, environmental, and natural resource management decisions in the United States because we depend on law to guide the exercise of administrative discretion.”).

255. See S.B. 82 § 1(2)(a), 73d Leg. Assem., Reg. Sess. (Or. 2005), available at <http://www.leg.state.or.us/05reg/measpdf/sb0001.dir/sb0082.en.pdf> (“The purpose of the task force is to study and make recommendations on [t]he effectiveness of Oregon’s land use planning program in meeting current and future needs of Oregonians in all parts of the state.”).

256. THE BIG LOOK TASK FORCE, CHOICES FOR OREGON’S FUTURE 1 (May 30, 2008), available at http://centralpt.com/upload/301/5291_BigLook_StakeholderBooklet_060608_screen.pdf.

257. See Smith, *supra* note 242, at 263

Integrating economic and environmental concerns is the controlling policy objective of sustainable development. This policy provides a mechanism for societies to conceptualize the economy and the environment as integrally related aspects of a struggle towards a common societal goal, rather than separate values that must be balanced against each other.

Id.

258. *Id.* at 283–84.

substituting renewable resources for nonrenewable resources when possible.²⁵⁹

According to Professor Susan Smith, in order to achieve a sustainable use of nonrenewable resources, consumption must be minimized through efficient use.²⁶⁰ Land is a nonrenewable resource. Therefore, in order to achieve sustainability in land use development, it is necessary that “[a]ny set of policies must meet a precondition of sustainability or preservation of a nondeclining natural capital stock.”²⁶¹ This concept is differentiated from the idea of just “including the environment as an independent factor” in creating environmental policy.²⁶² On the face of the Task Force’s report, it appears that they are taking into account the need to implement sustainable development into any future land use program; however, as noted by Professor Smith,

[S]imilarly, process is not enough. Sustainable development may be accomplished through a process that integrates environmental considerations into development decisions by involving the public and building consensus on development policy across diverse interests. However, those who emphasize a consensus-building process tend to elevate process over substance. By definition, consensus decision making is almost a pluralistic form of cost/benefit analysis dominated by the interests of the current generation without consideration of future generations.²⁶³

The Task Force has placed key importance on listening to and considering public comment on land use planning, thus possibly falling into the trap warned of by Professor Smith by prioritizing process over substance.²⁶⁴ In public opinion research conducted by the Task Force, it was concluded that “protecting the rights of property owners” was the most important fundamental value of Oregonians, followed by “protecting farmland for farming.”²⁶⁵ In another conclusion by the Task Force, they emphasized the need of the state to understand “the values of Oregonians, particularly as they

259. *Id.* at 284 (citing INT’L UNION FOR THE CONSERVATION OF NATURE AND NATURAL RESOURCES ET AL., *CARING FOR THE EARTH: A STRATEGY FOR SUSTAINABLE LIVING* 211 (David A. Munro & Martin W. Holdgate eds., 1991)).

260. *Id.*

261. *Id.* at 286.

262. *Id.*

263. *Id.* at 302.

264. THE BIG LOOK TASK FORCE, *PRELIMINARY FINDINGS AND RECOMMENDATIONS*, *supra* note 251, at 4.

265. *Id.* at 8 tbl.

shift or change over time.”²⁶⁶ In looking to the current generation’s values in order to define the goals for the state’s land use planning scheme, the Task Force is allowing the process to be dominated by the needs of the current generation without adequate consideration of future generations.

C. Recommendations

While the debate among private property rights advocates and those in favor of governmental regulation is likely to continue for many years to come, the concept of sustainable development, if properly incorporated, can serve as a viable solution to the real threat that unchecked development poses to natural resources. In addition, a land use planning system based on sustainable development, when combined with a “Transferable Development Rights”²⁶⁷ program to protect the economic interests of private property owners, has the potential to be a workable solution to the current property crises that Oregon faces. In order to be a viable solution however, the current system and proposed changes to it must first properly integrate the concept of sustainable development into the process through substantive goals.

First, as mentioned earlier, the Task Force needs to adopt a workable definition of sustainable development that can be used as the basis of hard laws that will be implemented using their recommended goals. Sustainability should not be an aspiration that we encourage communities to strive towards—it should be a requirement. A good definition has already been provided through the Oregon Sustainability Act, and that can serve as the basis for the Task Force. Furthermore, as opposed to having the separate goals of “providing a healthy environment” and “sustaining a prosperous economy,” the Task Force should adopt a goal that encompasses the concept of sustainable development, incorporating both these ideas without balancing them against one another. A “Sustainable Development Goal” could be the primary goal that serves as the guiding principle for the rest of the land use planning framework. The goal should be enforceable and ensure that we maintain a non-declining stock of natural capital. By clearly defining the substantive goal as a framework to create a process which then implements the goal of sustainable development, the Task Force will be able to step

266. *Id.* at 12.

267. JURGENSMEYER & ROBERTS, *supra* note 8, at 326.

away from the flawed assumption that “process will lead to harmony [among the competing factions] and long term ecosystem protection.”²⁶⁸ Once a substantive goal is put into place to create a framework, the Task Force should then create a land use planning model based on the original 1973 law, which created constraints, as a means to maintain the four conditions of sustainability.

In addition to reworking the present model to include a foundation rooted in sustainability, the Task Force should then consider some form of incentive program to not only maintain the system in the long run, but to appease the private property rights group. One feasible alternative to the current system, which uses UGBs to restrict development of natural resource land,²⁶⁹ would be to implement a system of transferable development rights (TDR). While a full discussion of TDR programs is beyond the scope of this paper, the purpose in mentioning it here is to encourage policy makers to consider alternatives to the current system.

TDR programs allow a private landowner of high-value natural resource land to benefit economically through the creation of a market for development rights, rather than through the “development of that land or the payment of public funds.”²⁷⁰ Thus, the TDR program serves two functions. First, it allows for the preservation of valuable natural resource land.²⁷¹ Second, it provides a form of compensation to the landowner who is unable to develop that land.²⁷² This solution would effectively solve the issues created by Oregon’s land use planning program with respect to providing just compensation to private land owners while at the same time protecting the environment. More than 130 local governments and twenty-two states have adopted some form of TDR program.²⁷³

TDR programs address the concerns of property rights advocates by providing real assessment of the financial impacts of contemplated land-use goals on property owners, and by responding to those impacts with access to mitigating rights in the form of transferable

268. A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 664–65 (2007).

269. JURGENSMEYER & ROBERTS, *supra* note 8, at 326.

270. *Id.* at 379–80.

271. *Id.*

272. *Id.*

273. State Envtl. Resource Ctr., Transfer of Development Rights, <http://www.serc.org/tdr/background.html> (last visited Nov. 22, 2008).

development credits.²⁷⁴ Additionally, an effectively created and managed TDR program can solve the externality problems associated with private development by “forcing developers to internalize the costs associated with land development.”²⁷⁵ Furthermore, by providing adversely affected landowners with TDRs, the government can avoid the constitutional takings challenges associated with land regulations.²⁷⁶ Such a program could also solve the shortcomings associated with Measure 49, which still requires the government agency that enacts a land use regulation that reduces the private property’s FMV to provide just compensation or allow the development of that property.²⁷⁷ Such a flaw, allowing development of land that needs protection, would thus be solved through a TDR program because the development right of the owner is separated from the property itself.²⁷⁸ Thus a TDR program has the potential to solve the budgetary and constitutional problems associated with the current system while protecting Oregon’s high-value natural resource lands in the process.²⁷⁹

VII. CONCLUSION

Just as proponents of statewide land use planning must concede some meaningful limits on the government’s ability to strip the rights of private property owners, so too must property-rights advocates acknowledge that unrestricted and unplanned development creates social, economic, and environmental dangers and costs that must be controlled. Unchecked development creates substantial external impacts on the surrounding lands and community in general. The failure of both sides in the land use debate to acknowledge and address valid criticism injures society as a whole. Oregon’s statewide land use planning program, which “imposed substantive state planning goals on local communities” as a means to protect its valuable natural resources, was a praised model among land use planning advocates.²⁸⁰ However, the system was flawed, in that it did

274. Julian C. Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 444–47 (1998).

275. *Id.* at 380. (internal quotations omitted).

276. *Id.*

277. Measure 49, *supra* note 6, at § 12(4)(a)-(b).

278. JURGENSMEYER, *supra* note 8, at 380.

279. *Id.*

280. Tarlock, *supra* note 268, at 665.

not provide adequate protection of private property interests. Furthermore, while Oregon's land use planners were successful in protecting the state's valuable natural resources, the program has yet to be able to effectively integrate sustainable development into the process. There is an urgent need for some compromise to resolve the conflicting ideals and interests in a land use planning program. Through a revision of the current program, which would necessarily incorporate sustainable development into the substance of its goals and would include a TDR program as a means to maintain the system while at the same time mitigating potential economic losses of private property owners, Oregon could once again serve as a model for land use planning programs.