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Exporting Oregon's Measure 37 to Other States

By Leonard C. Gilroy, AICP

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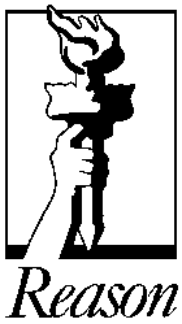

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Executive Summary

Since the widespread adoption of municipal zoning in the United States in the early twentieth century, there has been an expansion in the character and scope of state and local land controls and an increasing recognition that land use regulation significantly infringes on private property rights.

The nature of land use regulation has evolved beyond the common law, nuisance-based tradition that characterized the first century after the nation's founding. This nuisance-based approach was primarily focused on preventing harm to the property rights of others and giving property owners wide latitude in determining the best use of their land.

By contrast, contemporary land use regulation often uses public policy to mandate the private provision of amenities that benefit the community-at-large. As the regulatory scheme influencing local land use has grown more prescriptive and restrictive, there has been an increasing curtailment of private property rights. Landowners in many communities nationwide have been restricted in their ability to use their land in the ways that they had intended when they purchased their property, dramatically reducing their property's value and imposing an economic hardship on them.

The expanding reach of state and local land use regulation has led to a burgeoning property rights movement and increased calls for: (1) statutory or constitutional measures to reduce the infringement on private property rights resulting from government regulation (so called "regulatory takings"), and (2) compensation for landowners when their property rights have effectively been regulated away.

The experience of Oregon points to a new way of establishing clear boundaries for regulation and balancing the rights of private property owners with government's right to enact policies advancing the public interest. After decades of burdensome state and local land use regulation, a majority of Oregon voters took a decisive stand in favor of property rights in November 2004 and passed Measure 37, a ballot initiative designed to provide relief to landowners whose properties have been devalued by three decades of regulation and protect Oregon's property owners from economic hardship that may result from future regulations.

Measure 37 requires that local governments either: (1) compensate landowners when land use restrictions reduce the value of their property, or (2) waive the restrictions and reinstate the rights that property owners had at the time they bought their land.

Citizens, activists, and elected officials across the nation can look to Measure 37 as a model for regulatory reform.

Measure 37 represents a major advance for the national property rights movement by establishing a system that restores the rights of private landowners that had previously been taken away via regulatory action. It can be seen as simply having revealed the hitherto hidden costs of the state's heavy-handed approach to land use regulation and redirecting these costs in a more equitable and just manner that respects the American tradition of strong private property rights. Measure 37 also provides a check on government power by ensuring that state and local governments adequately weigh the costs and benefits of public action. In fact, Oregon's experience suggests that property rights are critical to successful planning efforts in the United States and that urban planning may not be sustainable unless it incorporates property rights into the regulatory framework.

The national property rights movement has been galvanized in recent years by Measure 37's passage, as well as widespread popular disenchantment with the abuse of eminent domain highlighted by the U.S. Supreme Court's *Kelo vs. New London* decision. Public recognition of the need to protect the constitutional rights of private property owners has never been higher.

Citizens, activists, and elected officials across the nation can look to Measure 37 as a model for regulatory reform as they continue the push to protect private property rights from the expanding reach of government and prevent landowners from being forced to bear the hidden costs associated with government regulation.

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Part 1

Introduction

When Dorothy English and her husband purchased their Multnomah County, Oregon property in 1953, they dreamed of someday dividing the property, giving some of it to their children and grandchildren and selling the remainder to fund their retirement. Yet, their plans were thwarted when the county subsequently rezoned their property in the interest of preserving local forest land, precluding the English's ability to develop their property for residential use. By preventing them from developing their property in a manner that was legal at the time they bought it, the county effectively regulated away the English's property rights and forced them to bear the costs of providing a benefit to the larger community.

The protection of private property rights is a foundational principle underlying our constitutional system of government and market-based economic system. In recent decades, states and local governments have adopted an increasing variety of land use regulations aimed at preventing the spread of urban sprawl and minimizing the effects of growth and development on the environment and citizens' quality of life. Notwithstanding the noble intentions of their designers, these regulations can significantly limit the rights of landowners to use their land in the ways that they had intended when they purchased their property and can dramatically reduce the property's market value, imposing an economic hardship on the owner.

The expanding reach of state and local land use regulation has led to a burgeoning property rights movement and increased calls for: (1) statutory or constitutional measures to reduce the infringement on private property rights resulting from government regulation (so-called "regulatory takings"), and (2) compensation for landowners when their property rights have effectively been regulated away.

For decades, the state of Oregon has been aggressive in land use regulation and is widely recognized among urban planners and growth management advocates as the national model for statewide land use planning and development control. Yet, the implementation of Oregon's land use planning system has come at a cost. Individual property owners have borne a disproportionate burden in the state's pursuit of its growth management objectives; according to one state estimate, it would cost the state $5.4 billion annually to compensate landowners for the regulatory impacts of Oregon's planning system.[1]

Decades of financial hardships borne by Oregon landowners have inspired efforts by property rights advocates to address the dramatic need for regulatory takings reform in that state, culminating in the November 2004 adoption by Oregon voters of Measure 37. Measure 37 requires that local governments either: (1) compensate landowners when land use restrictions reduce the value of their property, or (2) waive the restrictions and reinstate the rights that property owners had at the time they bought their land. Measure 37, and the lessons learned from both the campaign behind it and its implementation since its adoption by voters, offers a template for property rights advocates to follow in their efforts to enact meaningful regulatory takings reform in other states.

Part 2

Background on Regulatory Takings

A. What is a Regulatory Taking?

> *The moment the idea is admitted into society that property is not as sacred as the laws of God; and there is not a force of law and public justice to protect it, anarchy and tyranny commence.*
>
> *—John Adams, in a letter to Thomas Jefferson. July 16, 1814*

The protection of private property rights is a foundational principle underlying our constitutional system of government and market-based economic system. The Founding Fathers recognized the fundamental interconnection between private property rights and individual liberties, going so far as to enshrine the following protection—commonly referred to as the Takings Clause—in the Fifth Amendment of the United States Constitution: "[*N*]*or shall private property be taken for public use without just compensation*."

Law and economics scholar Henry N. Butler identifies several reasons why the Takings Clause was included in the Bill of Rights[2]:

- ***Economy*:** The protection of property rights promotes private investment and economic prosperity. Protecting landowners' ability to develop property in pursuit of their own needs and interests gives them the security they need to engage in activities that can lead to wealth generation and higher living standards.
- ***Equity*:** By ensuring that owners are compensated for the government taking of private property, no individual or group is forced to bear a disproportionate share of the costs of government programs. If government had the power to expropriate private land for a new highway, for example, without compensating landowners, then those landowners would essentially pay an unfair portion of the costs associated with providing an amenity that benefits the public-at-large.
- ***Limitation on Government Power*:** By limiting takings to those required for public uses, the Takings Clause limits the scope of government activities to those that involve primarily public, rather than private, benefits. In lieu of such limitations, government would theoretically have the ability to transfer property from one private party to another for any reason it saw fit. Also, the compensation requirement provides a check on government power by requiring it to pay for the resources it controls.

For nearly a century after adoption of the Constitution, the Takings Clause was thought to apply only to the exercise of the power of eminent domain—the government condemnation ("taking") of land for such public uses as roads and government buildings. In this context, the government body takes title to the condemned land after paying fair market value to the property owner. In practice, the scope of what defines "public use" has gradually expanded to include a wider variety of non-traditional activities (such as economic development), but this topic is not a particular focus of this paper.[3]

By the late 1800s, the expanding reach of government had led some property owners to argue that the Takings Clause also covered regulations that have the same effect as a condemnation under eminent domain. In planning and legal parlance, the term "regulatory taking" refers to a situation in which a government entity has effectively "taken" private property without just compensation through regulations that preclude uses clearly within the property rights of the owner.[4]

Regulatory takings may occur in a variety of ways, including[5]:

1. Government regulations restricting the uses of private land and the types of development that may occur on it (e.g., local zoning codes, habitat preservation regulations, open space preservation ordinances);

2. Public access requirements on private property (e.g., development exactions for beach access easements, sidewalk easements, bicycle paths, etc.); and

3. Government denial of permit applications (e.g. wetlands permits, mineral extraction permits).

Zoning and land use regulations are perhaps the most common ways in which government action serves to diminish the value of private property by dictating which uses are allowed on any given piece of land. For example, if a city creates a zone in which no home or structure can be built on lots smaller than 10 acres, then the owner of a one-acre parcel within that zone could argue that the government has effectively taken his or her property via its zoning regulation.

Property owners who believe that a regulatory action effectively "takes" their property can file an inverse condemnation suit against the government for violating the Fifth Amendment and demand compensation. In their suits, property owners must prove their assertion of a taking to the satisfaction of a court before they are eligible for compensation. In other words, property owners bear the burden of proving that a regulatory taking has occurred.

Since any law or regulation can conceivably have some impact on property values, over time the courts have had to step in to clarify what actually constitutes a compensable taking. But the difficulty in determining when laws and regulations are so severe that they amount to a taking of private property has been a subject of much debate in the courts over decades, particularly in the United States Supreme Court.

What are Property Rights?

Property rights—the rights held by owners of private property—are often likened to a bundle of sticks, where each stick represents a "right" or a benefit to the bearer. For any given property, the owner holds "sticks" that include the right to sell, lease, mortgage, subdivide, grant easements, and to use the property in the way he sees fit. By their nature, property rights are fundamentally protective in their function, as they restrict the actions of other individuals and establish a boundary across which other parties cannot cross.

Since they serve to limit the negative actions of other parties (government or private), the effective enforcement of property rights serves to curtail behavior and release individuals' creativity to shape their environment to suit their own needs, wants, and preferences. Hence, a key element of property rights, and their protection in the legal system, is the embodiment of individual expression and effort, and as a consequence, innovation.

For centuries, Americans have generally held the notion that property rights held by private landowners are sacrosanct, but the historical trend of ever-increasing government regulatory action over the last century suggests that the public sector has increasingly arrogated to itself more and more "sticks" from the bundle through the power to tax, to condemn property for public use via eminent domain, and to enact and enforce regulations. For example, through the adoption of zoning and land use regulations, governments have increasingly limited the ability of private landowners to subdivide or develop property in ways that were previously available to them, effectively taking "sticks" from the private sector and limiting their size and scope (i.e., circumscribing the uses of private land and the economic opportunities generated thereon). In addition, private property rights have never been sacrosanct in the sense that they are inviolable. The Fifth Amendment to the U.S. Constitution outlines the principles under which government can abrogate private property rights, and civil law adjudicates non-criminal disputes among private properties.

In this sense, property rights are not absolute but have effectively fluctuated over time according to what society is willing to recognize, defend, and enforce.[6] To a certain extent, this trend can be explained by the relative lack of explicit property rights protections in the United States Constitution. To the Founding Fathers, property rights were a paramount concept—most held the view that every right we have emanates from the right to private property—so there was little urgency to outline those rights explicitly. Indeed, the entire U.S. governance system and system of rights presumes the existence of property rights. However, alongside the rise of the progressive movement there seems to have arisen an assumption that, since property rights were given a low level of explicit recognition directly in the Constitution (there is no "property rights" amendment in the Bill of Rights, for example), then their importance to governance is limited.

Yet, this view is inconsistent with the role of property rights in a capitalist, market economy. Property rights encourage landowners to develop property, generate wealth and a higher living standard, and efficiently allocate resources based on the operation of the free market. As James Madison wrote in the Federalist Papers, government's primary role is to protect "the diversity in the faculties [abilities] of men, from which the rights of property originate." In this view, the intent of property rights protections is to assure citizens that the wealth they generate will not be arbitrarily expropriated by government.

Finally, property "rights" are often confused with property "values." Property values are a measure of property values at a given point in time in a real estate market with willing sellers and buyers, and there is no "right" to a particular value of property, just as consumers do not have a "right" to purchase a product at a department store at a particular market price. In this sense, the value of property is what the market deems at any given time to be the worth of the rights associated with that property. Hence, the main objection to regulatory takings centers on the effects of a policy intervention that prevents property owners from realizing the full value of their property in the real estate market. Conversely, there is no "right" to a particular price for a property when the market shifts in such a way as to make it less valuable.

B. Landmark Supreme Court Rulings on Regulatory Takings

Until the early 20th century, the U.S. Supreme Court had little difficulty determining compensation for private property takings, effectively applying a "know-it-when-you-see-it" standard. In 1922, the Court followed a similar line of thinking in *Pennsylvania Coal Co. v. Mahon*, in which it first declared that regulations limiting the use of private property can provide justification for takings claims.

In *Pennsylvania Coal*, an individual landowner (Mahon) sought to prevent the Pennsylvania Coal Company from violating state law by mining under his land and endangering the structures on the surface. The company had originally sold Mahon's property to its previous owner, conveying surface rights but explicitly reserving to the company the right to remove the subsurface coal. After Mahon bought the property, the Pennsylvania legislature passed the Kohler Act in 1921, which prevented any coal mining that could result in subsidence that would threaten property and structures on the surface. Mahon sued the company under the Act to have the sub-surface mining halted.

The company claimed that Mahon willingly assumed the risk that any surface structures could subside, thereby waiving claims for any future damages. Further, it argued that a taking had occurred as a result of the Kohler Act because the company was prevented from mining the coal. The U.S. Supreme Court agreed and struck down the Kohler Act. Delivering the majority opinion, Justice Oliver Wendell Holmes wrote[7]:

> *Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. […]*
>
> *The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. […] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.*
>
> *The general rule at least is that while property may be regulated to a certain extent,* ***if regulation goes too far it will be recognized as a taking****.* [emphasis mine]

In *Pennsylvania Coal*, the Court effectively established a perception-based standard for regulatory takings, and this "know-it-when-you-see-it" test held for the following half-century.[8] Yet, by advancing the notion of a subjective determination, the *Pennsylvania Coal* decision failed to clarify what actually constituted a taking and what did not.

In 1978, the Court's decision in *Penn Central Transportation Co. v. New York City* noted the tradition of case-specific takings determinations, but went a step further than *Pennsylvania Coal* by positing three key factors to use in assessing whether a regulatory taking has occurred[9]:

> *[T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."*
>
> *In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The [1]* ***economic impact of the regulation*** *on the claimant and, particularly, [2]* ***the extent to which the regulation has interfered with distinct investment-backed expectations*** *are, of course, relevant considerations. […] So, too, is the [3]* ***character of the governmental action****. [emphasis mine]*

Later cases brought into question whether regulatory takings claims could be based on the legitimacy of a regulation itself, as opposed to the burden it imposes on a property owner. In its decision in *Agins v. City of Tiburon* (1980), a case in which a property owner challenged a local zoning ordinance that placed density restrictions on his land, the Supreme Court adopted a new two-pronged test for regulatory takings challenges[10]:

> *The application of a general zoning law to particular property effects a taking [1****] if the ordinance does not substantially advance legitimate state interests****, […] or [2]* ***denies an owner economically viable use of his land.*** *[emphasis mine]*

Many experts interpreted this as a means-ends test: that government must provide compensation for a regulation of property unless it could prove that the regulation was effective in achieving some legitimate public purpose, regardless of the three factors that the court identified in *Penn Central*. But the Court recently invalidated *Agins*' "substantially advances" test in *Lingle v. Chevron U.S.A., Inc.* (2005). In delivering the opinion of a unanimous Court, Justice Sandra Day O'Connor wrote that the "substantially advances" formula is not a valid method of identifying compensable regulatory takings under the Fifth Amendment[11]:

> *[T]he "substantially advances" inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property.*

Through its *Lingle* decision, the Supreme Court has clarified that regulatory takings determinations should be based on the severity of the burden that a regulation imposes on property owners, rather than the regulation's effectiveness in furthering the public interest.

In recent decades, the Supreme Court has affirmed that there are certain categorical situations in which it is evident a taking has occurred. *Loretto v. Teleprompter Manhattan CATV Corp.*, (1982), for example, involved a challenge to a state law requiring landlords to permit companies to physically invade real property to install cable television. The Court ruled that any regulation authorizing the physical occupation of property is a taking, regardless of any associated public benefits or economic impacts.[12] In another example, the Court found in *Lucas v. South Carolina Coastal Council* (1992) that government agencies must compensate landowners for land use restrictions when the owner is deprived of "all economically beneficial uses" of his property.

In two other landmark cases, *Nollan v. California Coastal Commission* (1987) and *Dolan v. City of Tigard* (1994), the Supreme Court recognized that the intent behind a regulation can be important in determining whether a taking occurs. In these cases, the Court found that certain regulatory permit conditions can be unconstitutional when there exists no “essential nexus” or “rough proportionality” between the condition imposed and the state’s legitimate policy interest served by it.

Finally, in *Palazzolo v. Rhode Island* (2001), the Court ruled that an owner’s pre-acquisition notice of regulations on property does not automatically preclude a takings claim, and it found that even if a regulation does not eliminate "all economically beneficial use" of a property under *Lucas*, the regulation could conceivably still result in a “partial” taking.[13]

C. The Current State of Takings Jurisprudence

In sum, the Supreme Court has slowly whittled away at the edges of the regulatory takings issue over the last century, but it has failed to provide clear and consistent direction in clarifying the extent to which private property is protected from diminution in use or value as a result of regulation. A 2001 article in the Goodwin Proctor *Environmental Law Advisory* summed it up thusly:

> *In sum, since 1922, the Court has despaired of finding one clear doctrinal test that defines when “regulation goes too far.” Instead, the Court has created several different fact-based standards that must be measured against the specific circumstances of each case. As the Court has struggled to formulate a coherent and comprehensible doctrine, commenters advocating for either private property rights or environmental protection have bemoaned the absence of a clear and predictable set of rules to guide the permitting and development process.*[14]

While the Court has established a set of criteria to provide general guidance in resolving regulatory takings claims over the last century, future cases are likely to fall outside the bounds covered by those criteria, making it impossible to draw a clear line beyond which government regulation is seen to impermissibly infringe upon private property rights.

In a larger context, it is clear that the regulation of land—largely the domain of state and local government—can impose substantial costs on some property owners, forcing them to bear the

financial burden for what government has deemed to be a public benefit. And from a practical standpoint, it would be almost impossible to require government compensation for every regulation that results in a loss of value of privately owned land. However, this does not diminish the need to offer private property owners reasonable protection from regulatory takings.

The experience of Oregon points to a new way of establishing clear boundaries for regulation and balancing the rights of private property owners with government's right to enact policies advancing the public interest. After decades of burdensome state and local land use regulation, a majority of Oregon voters took a decisive stand in favor of property rights in November 2004 and passed Measure 37, a ballot initiative designed to provide relief to landowners whose properties have been devalued by three decades of regulation and protect Oregon's property owners from economic hardship that may result from future regulations.

Part 3

Addressing the Impacts of Land Use Regulation

A. Property Rights and the Evolution of Land Use Regulation

With the rise of municipal zoning in the United States in the early twentieth century and the subsequent expansion in the character and scope of state and local land controls has come an increasing recognition that land use regulation can significantly infringe on private property rights. Historically, zoning was an outgrowth of the common law of nuisance and trespass, which governed land use since the country's inception and essentially defined and limited each property owner's rights to those that do not inflict harm upon or diminish the rights of his neighbors.

Nuisance laws are relevant to the discussion of regulatory takings because not all regulations—particularly those that prevent harm to the rights of others—infringe on private property rights. Under the common law of nuisance and trespass, the rights associated with property ownership do not include the right to create unlawful nuisances or violate another's property rights.[15] If a nuisance-based regulation serves to prevent a landowner from engaging in activities that would harm or violate the rights of others, such as polluting a stream that runs through a neighbor's land, then the landowner has no right to compensation because he has no right to use his property in such a manner in the first place.

Conversely, the common law of nuisance or trespass does preserve for landowners the right to engage in activities on their land that do not violate the property rights of others. If Landowner A wants to stop Landowner B from engaging in some activity that does not directly impact his right to use his property as he sees fit, Landowner A can offer to either (1) pay Landowner B to stop engaging in that activity for a period of time, or (2) purchase an easement from Landowner B to permanently stop the activity. The contemporary use of conservation easements and purchase of development rights programs are consistent with this approach to land regulation.

Municipal zoning can be seen as an attempt to codify and extend nuisance law on a city-wide scale. It is the product of an attempt by local governments to prevent land uses which, while not necessarily a nuisance in and of themselves, are potentially offensive or harmful to others,

particularly in areas with pre-existing residential or commercial development.[16] Zoning is intended to avoid nuisances by dividing a city into districts and prohibiting certain types of land uses within each district, effectively segregating land uses.[17] It is within this context that zoning restrictions have been upheld as a valid exercise of government "police power," through which national, state, and local legislative bodies enact regulations in the interest of protecting the health, safety, welfare, and morals of citizens.

However, zoning regulations can serve to limit private property rights by prohibiting landowners from using their land in the way they see fit or in the way that maximizes land value. For example, a landowner who purchased a 20-acre property in an area with no zoning restrictions would in theory be allowed to subdivide his property into 40 half-acre parcels for housing development. But if the area is subsequently zoned for rural residential development with a minimum lot size of five acres, then the landowner's right to subdivide would effectively be restricted to the extent that he would only be allowed to subdivide into four five-acre parcels (one-tenth of the original number of parcels allowed in lieu of zoning), significantly limiting the economic potential of the property. In some cases, communities have established minimum lot sizes sufficiently large that certain types of development, including residential, are effectively eliminated as a financially viable alternative. In addition, since the intent of minimum-lot size regulations is usually to slow growth and preserve open space, the imposition of the regulation effectively represents a wealth transfer from the property owner, whose development rights have been curtailed, to the community-at-large, who collectively reap the benefits of preserved open space. In other words, the regulation forces the private landowner to pay (via the "lost" development potential) for the benefit received by the public.

Historically, the payment of compensation to landowners whose property values have been reduced through regulation, including zoning, is rare and has generally been associated with the total, or near-total, taking of private property. The courts have largely upheld the government exercise of the police power via zoning as non-compensable regulatory activity, so long as the owner retains some reasonable economic use of his property.

Yet, the concept of the "police power" has gradually expanded over time to cover all manner of state or local government action. As a result, the courts are predisposed to viewing any action ostensibly undertaken for a "public use" or "public purpose" as a valid exercise of the police power.[18] For example, the U.S. Supreme Court has consistently upheld the state and local government power to restrict a wide variety of uses and activities not considered nuisances under common law, such as siting adult theaters in certain locations, building houses on lots smaller than one to five acres, permitting three or more unrelated tenants to share a single home, mining gravel, and constructing tall buildings.[19]

With the expansion of the activities deemed legitimate exercises of the "police power" has come a widening of the scope of zoning regulation. New York City—which passed the country's first citywide zoning ordinance in 1916—offers an illustrative example. The City's original ordinance contained three zoning districts (residential, commercial, and unrestricted); five height districts;

and three classes of area.[20] The current zoning ordinance would likely be unrecognizable to drafters of the original ordinance, as it has expanded to include dozens of zoning districts and a numerous other land use controls—such as minimum lot widths, minimum lot areas, floor-area ratios, minimum side-yard widths, minimum driveway length, maximum building height, and minimum parking requirements. The New York City example is hardly atypical; many local zoning ordinances have seen extensive modification and expansion over the years.

Noted constitutional scholar and property rights expert Bernard Seigan explained the expanding nature of zoning in this way:

> *[Z]oning has been the story of unrealized expectations. To date, we have had six or seven different zoning systems or strategies in this country. Each has been introduced with what has turned out to be greatly inflated rhetoric as to what it would accomplish. … Each zoning system, in turn, has for the most part failed to meet the expectations created by that rhetoric. The result, every time, is a new effort at the drawing boards, producing more and increasingly severe rules and regulations that, experience suggests, are not likely to be more successful than the previous ones.*[21]

Along with the increased scope of zoning regulation has come a wide array of other types of land use controls. For example, comprehensive planning—the legislative adoption of policy statements that aim to coordinate future development according to a set of goals regarding such matters as land use, transportation, housing, utilities, conservation, and community facilities—has become ubiquitous in urban policy and often uses zoning regulations as a primary implementation mechanism. Further, mandatory local comprehensive planning and zoning has become an integral component of state planning enabling statute reforms and is heavily promoted in the "smart growth" movement. For example, Oregon is widely recognized among urban planners and growth management advocates as the national model for statewide land use planning and development control. State law requires all city and county governments to develop comprehensive plans that protect farms, forests, and other resources and that provide for community needs such as housing, recreation, and economic development. (See Appendix A for further discussion of Oregon's system of land use regulation.)[22]

In conjunction with zoning, subdivision regulations are another means by which local governments have stepped in to place greater controls over private land development. While the primary focus of zoning is to control the use of land and the density of development, governments use local subdivision regulations to control the division of land tracts into building lots and the provision of infrastructure by specifying requirements for road widths, sidewalks, landscaping, buffers, grade of infrastructure, bulk and height restrictions, lot and yard widths, floor-area-ratios and other aspects of development.

In addition, the development approval procedures adopted by local governments often require that designated government bodies (such as municipal planning departments and planning commissions) review and approve proposed subdivision plats before a property owner is given permission to divide and sell his land. The proliferation of local development regulations and

approval processes has shifted the balance of property rights over time from a condition in which landowners had tremendous discretion to develop their properties in the manner they saw fit to a system in which government has the final say on what property owners can and cannot do with their property. In some cases, zoning has become specific enough that land uses are largely determined by the local government. The development approval process itself has led to increased local administrative discretion and procedural delays that have served to increase the costs of property development. One recent study by the Lincoln Institute of Land Policy found that developers in both 1976 and 2002 felt that subdivision standards and zoning regulations both substantially increased the cost of the homes they built.[23]

Local governments have also increasingly imposed "exactions"—requirements that property owners pay for or provide public amenities as a pre-condition to development approval—to shift the costs of infrastructure provision from the public sector to private property owners. Exactions may take a variety of forms—including required land dedications and impact fees levied on property owners—and typically provide funds for water and sewer infrastructure, roadways and bike paths, schools, and recreation facilities. While exactions are often upheld as valid exercises of the police power, local governments have become more creative in imposing exactions that have little to do with addressing the tangible impacts of the project in question, leading to charges that some types of exactions (1) unduly restrict private property rights, resulting in regulatory takings, (2) confer benefits to the public disproportionate to the actual impacts of the proposed development, and (3) regulate for the purpose of raising revenue rather than to promote public health, safety, and welfare.

For example, the landmark 1994 U.S. Supreme Court regulatory takings case *Dolan v. City of Tigard* involved a hardware store owner in Tigard, Oregon, who wanted to expand her store, but was required by the city to dedicate part of her property for a storm drainage system and another part for a bicycle path intended to relieve traffic congestion in the city's Central Business District, both as pre-conditions for project approval. The Court found that the city's dedication requirements amounted to an uncompensated taking of property, as the city could not demonstrate why the store expansion created the need for the dedications. The Court upheld the use of exactions to advance legitimate public interests, but only when the exactions required are "roughly proportional" to the impact of the proposed development.

Another famous example of a regulatory taking via exaction comes from California. In 1982, James and Marilyn Nollan requested permission to rebuild their beachfront bungalow in Ventura County, California. The California Coastal Commission—the state's coastal development regulatory agency—conditioned their permit approval on a requirement that they provide an easement for public beach access through their property. The Nollans sued the Commission on the grounds that the easement requirement was an unconstitutional taking of their property. In 1987, the U.S. Supreme Court ruled in *Nollan v. California Coastal Commission* that requiring a permanent physical occupation of the Nollan's property as a condition for building permit approval represented a compensable taking. According to the Court's logic, if the state of California finds

that an easement serves an important public purpose, it should use its eminent domain power to pay for it, rather than it compelling coastal property owners alone to provide this public benefit.

Though these two cases represented “wins” for property owners, state and local governments routinely impose a variety of exaction requirements on property development that, while upheld by the courts as valid exercises of the police power, also place a significant financial burden on property owners. In their seminal book on land use exactions, *Regulation for Revenue: The Political Economy of Land Use Exactions*, authors Alan Altschuler and José Gómez-Ibáñez's argued that crafting regulatory systems explicitly to produce revenue (rather than in the interest of public health and safety), represents "a dramatic power shift...from the owners of property to government officials." Prior to 1960, only about 10 percent of American local governments imposed exactions, but by the mid-1980s this total increased to 90 percent.[24]

Finally, over the last century state and local governments have increasingly adopted a variety of regulations to address environmental and historic preservation concerns. At the local government levels, this often occurs by either expanding the scope of existing zoning and subdivision regulations or through the use of special district regulations such as overlay zones, special zones placed over an existing zoning district (or parts of districts) that apply a special set of regulations in addition to the requirements of the underlying zoning district. Examples of some of the areas covered in special district regulations include wetlands, historic districts, habitat conservation zones, view corridors, and floodplains.

For example, in concert with federal and state wetlands regulations, some communities have established wetlands overlay districts that preclude many forms of development on wetlands or anywhere within a certain buffer (25 feet, for example) of delineated wetland boundaries. Property owners are required to submit development plans to regulatory bodies to evaluate the potential impacts on wetlands before the owner is allowed to proceed. If regulators find that the proposed development would result in a disturbance or loss of wetlands, the owner may be offered a permit with strict conditions on development or denied permission to develop the property altogether. Either way, restrictions on the use of the property can lower its value substantially and preclude any number of uses of the property that would have otherwise been available to the owner. In addition, the development approval procedures mandated by wetlands regulations often impose lengthy and costly development delays.

While wetlands do offer certain environmental benefits (such as natural water filtration and wildlife habitat provision), the benefits of preserving wetlands accrue to society-at-large but are paid for only by owners of properties that include wetlands. Hence, property owners impacted by wetlands regulations have brought numerous regulatory takings lawsuits against federal and state governments. Yet, over the last three decades, state courts have rarely sided with landowners in these disputes, despite the fact that a growing number of states have enacted wetlands protections; plaintiffs in federal wetlands cases have fared little better.[25]

Historic preservation ordinances and districts are another type of special district regulation increasingly used by local governments to protect cultural landmarks and maintain the character of older neighborhoods. This type of regulation generally mandates a rigorous design review process for development proposals (either district-wide or on specific parcels) and establishes requirements for building colors, facades, and other architectural and structural details for new or renovated buildings. While they may protect a public good and enhance community welfare to a certain extent, historic preservation regulations also allow governments to impose strict development controls and building renovation requirements at minimal public expense, while simultaneously restricting private landowners from using their land for alternate, viable uses, such as commercial or residential development.

For example, one analysis of historic preservation regulations in Ohio found that a city's designation of an individual farmhouse on a 30-acre parcel as a historic landmark would effectively cost the property owner between $600,000 and $900,000 in renovation costs and foregone revenues from taking the property off the market.[26] Had the cost to preserve the farmhouse instead been spread over the entire city (which ostensibly benefits from the home's historic designation), each housing unit would have received a $98 assessment. This situation provides a stark example of how the regulatory process can place an inordinate financial burden on a minority of landowners for the benefit of the community-at-large.

While zoning, subdivision regulations, exactions, and special district regulations comprise the main areas of land use regulation that impact property rights, they do so to varying degrees depending on the specific nature of the regulation itself. For example, planned unit developments (PUDs) offer developers an opportunity to build projects that deviate from traditional zoning and subdivision regulations by giving them greater flexibility in land use, density, and design characteristics like setbacks and building height. In this way, PUDs offer more options to landowners and are less restrictive than traditional zoning and subdivision ordinances.

The increasing breadth and depth of land use regulation over time has significant implications for property rights and regulatory takings analysis. The nature of land use regulation has evolved beyond the common law, nuisance-based tradition—primarily focused on preventing harm to the property rights of others, refraining from controlling land uses that do not produce tangible spillover effects, and giving property owners wide latitude in determining the best use of their land—to an approach that is much more prescriptive.

This nuisance-based approach stands in stark contrast to the tendencies reflected in contemporary land use regulation, which often uses public policy to mandate the private provision of amenities that benefit the community-at-large. As the regulatory scheme influencing local land use has grown more prescriptive and restrictive, there has been an increasing curtailment of private property rights.

The contrast between the two approaches is summarized in the following figure. The zoning regulations with the lowest impacts on property rights give property owners the greatest freedom to

use their property as they see fit, providing the uses do not create nuisances or spillover impacts for neighbors and the community. The highest impact land use regulations tend to be most prescriptive and substantially restrict land uses, giving property owners the least amount of freedom (short of a physical taking of property).

Recognizing the historical shift toward more prescriptive and restrictive land use regulation, the modern property rights movement has focused on advancing three key principles:

(1) that the notion of property ownership implies that landowners should be allowed to enjoy the full use of their property, provided that such use does not harm other people or their properties;

(2) that land use regulation has gone too far in forcing a minority of private landowners to bear the costs of providing public goods that benefit the entire community; and

(3) that fairness requires that private landowners be compensated by government to pay for the public benefits it receives through regulatory action.

Relative Impacts on Property Rights of Various Land Use Regulations

Impact on Property Rights	Type of Land Use Regulation			
	Zoning	Subdivision Regulations	Exactions	Special District Regulations
Low ↓ High	Nuisance-based regulation	None		
	Form-based regulations (deregulate land use, but not density)			
	Performance-based zoning (using specific performance criteria to generate a specific outcome)		Subdivision dedications and fees (tied closely to project-specific impacts)	
	Planned unit development	Planned unit development	In-lieu fees	
			Impact fees	Historic preservation districts Scenic view districts Habitat conservation districts
	Traditional zoning	Traditional subdivision regulations	Compulsory land dedications	Floodplain districts Wetland overlay districts

B. Measure 37: Addressing the Impacts of Land Use Regulation in Oregon

Oregon is widely recognized among urban planners and growth management advocates as the national model for statewide land use planning and development control. In 1973, the Oregon legislature enacted Senate Bill 100 (S.B. 100), which established an extensive statewide land use planning system mandating that city and county governments develop comprehensive plans and land use regulations in conformance with state-specified standards intended to protect farms, forests, and other resources and to provide for community needs such as housing, recreation, and economic development. Oregon's planning system also established urban growth boundaries (UGBs) around its cities, keeping development within these boundaries and placing strict limits on vast parcels of private agricultural and forest land outside of them.

The primary complaints about Oregon's land use planning system are that many individual property owners have had their property rights stripped away and have been forced to bear an unfair financial burden in the state's pursuit of its growth management objectives. Many of the original proponents of S.B. 100 were concerned that its implementation could adversely affect some property owners, and the adopted bill created an interim task force to study a landowner compensation program. However, the task force never completed its work, and the legislature repealed this section of S.B. 100 in the 1980s. Despite a series of studies of compensation alternatives and various legislative proposals during the 1970s and 1980s, none of these efforts resulted in the adoption of a compensation plan.

In response to decades of heavy-handed land use regulation and the increasing public recognition that individual private landowners were largely bearing the costs of implementing the state's growth management system, Oregon voters approved Measure 7—a constitutional amendment requiring that property owners be compensated when state or local regulations reduced the value of their property—in November 2000. It specifically provided that,

> *If the state, a political subdivision of the state, or a local government passes or enforces a regulation that restricts the use of private real property, and the restriction has the effect of reducing the value of a property upon which the restriction is imposed; the property owner shall be paid just compensation equal to the reduction in the fair market value of the property.*

The passage of Measure 7 was a watershed moment in the national property rights movement. A 2003 article in *Housing Policy Debate* identified Measure 7 as "the broadest and most far reaching requirement for compensation for regulatory 'takings' yet approved in the United States."[27] But Measure 7 was short-lived; Oregon's Supreme Court subsequently invalidated the measure as unconstitutional on procedural, not substantive, grounds.

In response, the property rights advocacy group Oregonians in Action successfully placed a voter initiative with similar intent—Measure 37—on the 2004 ballot. Oregon voters approved Measure 37 in November 2004 by a 61-to-39 percent margin. Similar to Measure 7 before it, Measure 37 required compensation to landowners if a government regulation reduced the value of their

property. However, Measure 37 went further by giving local governments the option to waive or modify regulations as an alternative to compensation (see Appendix B for the full text of Measure 37).

Proponents argue that Oregon's current land use planning system is unfair to property owners and that Measure 37 restores to landowners property rights that have been taken away from them by land use regulations. In this view, the regulation of private property for the public benefit should be paid by all taxpayers instead of by individual landowners. If the public benefits of planning are as worthy as supporters claim, then paying compensation to property owners is merely acknowledging the public value of such benefits and not shifting the cost burden onto a minority. However, prior to Measure 37, there was little hope of compensation when the imposition of government regulations effectively reduced the value of private property in Oregon.

The political history of land use regulation in Oregon offers some insight into Measure 37's popular appeal. Oregon did not reject markets or property rights when it passed S.B. 100. As mentioned previously, S.B. 100 required the legislature to set up a commission to develop recommendations to address regulatory takings and compensation, but it failed to do so. Hence, Measure 37 can be seen as an attempt by citizens to deal directly with an issue the legislature failed to adequately address or resolve over the years. Oregon's experience suggests that property rights are critical to successful planning efforts in the United States and that urban planning may not be sustainable unless it incorporates property rights into the regulatory framework.

C. Key Features of Measure 37

Under Measure 37, private property owners in Oregon are entitled to receive just compensation when a land use regulation is enacted after they (or a family member) became the owner of the property if they can demonstrate that the regulation restricts the use of their land and reduces its fair market value.[28]

If the property owner's compensation claim is upheld, then the government responsible for the regulation must either: (1) pay the property owner an amount equal to the reduction in value or, (2) modify, change or waive the regulation to the owner's property. As a hypothetical example, consider the case of a landowner who purchased an 80-acre farm property in 1950. At the time of purchase, the owner could have split the parcel into 80 one-acre parcels for residential development, but subsequent state farmland preservation regulations prevented him from subdividing his property. If the property is currently valued at $5,000 per acre (or $400,000 total), but the property would be valued at $15,000 per acre (or $1.2 million total) if developable for residential use, then the landowner would be entitled to file a Measure 37 claim to recover the difference between the two values, or $800,000. If the claim was determined to be valid by the state, then it would be responsible for either paying the compensation or waiving the regulation and allowing the landowner to subdivide his property.

Measure 37 makes a distinction in how compensation claims and waiver claims are to be handled. Compensation claims revert to the date property was acquired by the current property owner or a family member. However, in the case of waiver claims, the only restrictions that can be waived are those that went into effect after the current property owner (not a previous family member) acquired the property.

Measure 37 specifically exempts several types of land use regulations from compensation claims:

- Historically recognized public nuisances;
- Public health and safety regulations, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- Regulations enacted to comply with federal law; and
- Regulations restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.

Measure 37 also specifies a set of two-year time windows in which claims may be filed. For regulations enacted before the effective date of Measure 37 (December 2, 2004), potential claimants may submit written compensation claims until: (1) December 2, 2006, or (2) two years after the date the government applies a land use regulation as an approval criteria to a development application, whichever is later. For regulations enacted after the effective date of Measure 37, landowners must submit compensation claims within two years after: (1) the regulation was enacted, or (2) the date the government applies a regulation as an approval criteria to a development application.

Measure 37 gives local governments 180 days from the date the owner submits a written request for compensation to process the claim and make a decision on a remedy if it finds that compensation is due. Property owners found to have successful Measure 37 claims are also entitled to reimbursement for attorney fees, expenses, and other costs associated with filing their claims. If the government has not resolved a Measure 37 claim after 180 days, then the owner may file a lawsuit in the circuit court in the county in which the property is located.

Finally, Measure 37 offers much discretion to governments in creating their processes for handling compensation claims. This allows smaller cities and counties to adopt different laws from larger cities and counties (or the state) in establishing their Measure 37 administrative procedures. At the same time, Measure 37 provides that the property owner can, but is not required to, follow the government-established process for handling claims. As long as they file their claims and wait the 180-day period for the government entity to process and decide the merits of their claims, property owners are still entitled to take legal action if their claims are not acted upon or decided in a way that is unsatisfying to them. This approach gives state or local government the freedom to create whatever process best suits the needs of the community, while simultaneously protecting property owners from any onerous administrative burdens (such as exorbitant claim processing fees or excessive documentation requirements) that governments may choose to impose upon Measure 37 claimants.

Part 4

Designing a State-Level Regulatory Takings Measure

The protection of property rights has generated enormous interest at the state level in recent years, building on the momentum generated by the passage of Measure 37 in Oregon, efforts to reform the federal Endangered Species Act to include a compensation element, and the U.S. Supreme Court's ruling on eminent domain in its 2005 *Kelo vs. City of New London* decision.

Popular support for private property rights protection has surged in recent years, particularly after the media attention given to the *Kelo* ruling. A *Wall Street Journal*/NBC News poll taken in July 2005, just weeks after the Court issued its *Kelo* decision, found that survey respondents cited "private-property rights" as the current legal issue they care most about, topping such contentious issues as parental notification for abortion for minors and state right-to-die laws.[29] According to Oregonians in Action President David Hunnicutt, prior to the *Kelo* decision "there was little recognition among those not active in the property rights movement of the power of government to take land from Private Citizen A and give it to Private Citizen B or to use regulation to essentially take away any ability people have to use their property."[30]

Property rights activists and legislators in several states are already taking steps to capitalize on the momentum generated by the *Kelo* decision, the successful passage of Measure 37 in Oregon, and the state Supreme Court ruling upholding Measure 37's constitutionality in February 2006 (see sidebar). Activists in Oklahoma, for example, successfully placed a measure on the November 2006 ballot that would restrict the use of eminent domain and require compensation for regulatory takings. Activists in several other states, including Washington, Missouri, California, Michigan, Montana, and Arizona, are drafting similar property rights initiatives modeled on Measure 37 to place on the 2006 or 2008 electoral ballots. In addition, legislators in several states—including South Carolina and Georgia—introduced property rights protection bills in their 2006 legislative sessions.

Kelo v. New London: Supreme Court Decision Puts Spotlight on Eminent Domain Abuse

On June 23rd, 2005, the U.S. Supreme Court upheld government efforts to use the power of eminent domain to seize private property for economic development purposes. In *Kelo v. City of New London*, a small band of property owners challenged New London, Connecticut's authority to seize their homes and businesses for the sole purpose of redeveloping the land to generate higher tax revenues.

In 2000, New London officials targeted a 90-acre section of the city for redevelopment to clear the way for new offices and luxury apartments to complement a recently completed Pfizer, Inc. research facility. A group of 15 property owners, including lead plaintiff Suzette Kelo, refused to sell their properties, prompting the city to condemn these owners' lots. The owners subsequently sued the city for misusing its eminent domain power, arguing that economic development did not qualify as a "public use."

The Supreme Court sided with the city in the 5-4 decision, which effectively made private property rights a non-issue for local governments as long as they follow proper legal procedures. In a stinging dissent, Justice Sandra Day O'Connor wrote, "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."

The *Kelo* decision generated tremendous media coverage and provoked a sense of outrage across wide swaths of the American populace. For example, a Quinnipiac University poll taken in

Connecticut found that 89 percent of respondents opposed the taking of private property for private uses, even if it promotes the "public good."

- Federal and state governments responded swiftly to the *Kelo* decision. As of April 2006:
- Twelve states (Alabama, Georgia, Idaho, Indiana, Kentucky, Michigan, Ohio, South Dakota, Texas, Utah, West Virginia, Wisconsin) enacted legislation to prohibit the use of eminent domain for economic development. Delaware also passed eminent domain legislation, but it ties the exercise of eminent domain to planning and does not limit the scope of "public use."
- Eminent domain legislation introduced in the 2006 legislative session was still active in 25 other states, including California, Colorado, Connecticut, Florida, and New York. Legislation introduced in Mississippi, Virginia, Washington, and Wyoming failed to pass in the 2006 session. In addition, New Mexico's Gov. Bill Richardson vetoed an eminent domain reform bill passed by the state legislature.
- The U.S. House of Representatives passed the Private Property Rights Protection Act of 2005 (H.R. 4128) in late 2005, which would prevent state and local governments from exercising the power of eminent domain for economic development purposes if they receive federal funding, as well as prohibit the federal government from condemning property for economic development. Also, the House approved H.R. 3058, an amendment to a Treasury, Transportation, and Housing and Urban Development Appropriations bill that would deny federal funds to any state or local project involving the use of eminent domain on economic development grounds. Several Senate bills covering eminent domain reform have also been introduced.
- By an overwhelming 365-33 margin, the U.S. House of Representatives passed a resolution expressing disagreement with the majority in the *Kelo* decision.

Measure 37 Inspires Other States to Address Property Rights Protections

The national property rights movement was galvanized by the successful passage of Measure 37 in Oregon and the subsequent Oregon Supreme Court decision upholding its constitutionality, inspiring activists and legislators in several other states to propose similar reform measures. For example:

Washington: In February 2006, the Washington Farm Bureau filed final language with the Secretary of State's Office for Initiative 933 (the "Property Fairness Act") that would require state and local government to compensate landowners when regulations "damage the use or value" of private property. While it bears some similarity with Measure 37, Initiative 933 would go further by requiring agencies and local governments to detail any "actual harm or public nuisance" that proposed regulations are designed to stop or prevent, the extent to which they affect private property owners, and whether the goals of the proposed regulations could be achieved by less restrictive means, such as voluntary programs with willing property owners.

Under the initiative, property owners would be entitled to waivers or compensation for restrictions imposed any time after January 1, 2006. Initiative 933 supporters must gather the signatures of roughly 235,000 registered voters by July 7, 2006 to qualify for the November 2006 ballot.

Georgia: Senate Resolution 1040 (S.R. 1040) passed the Senate Judiciary Committee on March 3, 2006. S.R. 1040 would create a constitutional amendment authorizing the General Assembly to pass a bill in 2007 requiring local governments to pay compensation to property owners for the imposition of "unreasonably burdensome governmental actions," including land use and zoning regulations.

South Carolina: On March 15, 2006, the state House approved two bills that limit governments' ability to take property. By an overwhelming vote, the House approved H.B. 4503, which tightens state statutes governing the exercise of the eminent domain power and includes a provision that requires local governments to compensate landowners if new regulations decrease private property values. The regulatory takings provision was stripped from a companion bill, H.B. 4502, that would place a constitutional amendment on the ballot in November.

Using Oregon's Measure 37 as a model, this section outlines the key policy and strategy considerations that policy makers and property rights advocates in other states should consider in designing a statewide regulatory takings measure.

A. Policy Considerations

Although the specific approach to developing a regulatory takings measure will vary by state due to their unique circumstances and laws, the following sections outline the major policy factors for drafters to consider as they design the measure.

1. The Choice of Vehicle: Constitutional or Statutory?

The first major consideration for drafters to decide is if they want to amend the state constitution or, alternatively, state statutes. Depending on the state, there may be several options:

- Constitutional amendment via state legislative action;
- Constitutional amendment via the constitutional initiative process;
- Statutory change via state legislative action; or
- Statutory change via the statutory initiative process.

The reasons that advocates may prefer a constitutional amendment over a simpler and equally effective statutory change are varied. According to constitutional scholars Frank P. Grad and Robert F. Williams, advocates may pursue a constitutional amendment "in order to circumvent roadblocks in the legislative branch that make the passage of a statute impossible or unlikely; in order to bypass the legislature, and achieve the relative permanence of a state constitutional provision; in order to avoid legislative and judicial interference with the policy; in order to overrule existing judicial interpretations of the state constitution, and even in order to 'overrule' existing statutes."[31]

Regardless of whether they decide to pursue a constitutional amendment or statutory change, proponents of a regulatory takings measure will need to decide whether they want to pursue action through the state legislature or via a citizen initiative. The first option is relatively clear-cut; proponents will need to enlist the political support of one or more state legislators to introduce a bill or amendment for consideration by the legislature. Under the second option (only available in certain states, as described below), proponents would need to draft a measure or amendment and gather enough citizen signatures to place it on the electoral ballot via the citizen initiative process.

A total of 24 states have some form of initiative process—classified as either direct or indirect—for attempting constitutional and/or statutory changes (see Appendix C for complete list).[32] In the direct initiative process, constitutional amendments or statutes proposed by citizens are directly placed on the election ballot and then submitted to voters for approval or rejection. In the indirect initiative process, constitutional amendments or statutes proposed by citizens via petition must first be submitted to the state legislature during a regular legislative session.

A total of 18 states allow constitutional initiatives. Of these, 16 states use the direct initiative amendment process, and two states (Massachusetts and Mississippi) use the indirect initiative amendment process. A total of 23 states allow statutory initiatives. Of these, fourteen states allow direct initiative statutes and nine allow indirect initiative statutes.

Regardless of whether a measure is proposed legislatively or through citizen initiative, several factors will influence the choice between pursing a constitutional amendment or a statutory change:

- ***Public support for the measure***: Though there may be widespread public support for enacting a regulatory takings measure, a small, but significant percentage of voters is likely to have a strong negative reaction to the very idea of amending the state Constitution, regardless of whether or not they support the underlying issue that an amendment would address. If public support for the issue is high enough (70 percent is a conservative estimate), then any drop-off in support that may occur as a result of public opposition to a constitutional amendment would be unlikely to jeopardize chances of passage.

- ***Political support for the measure***: In states in which a large majority of elected officials in the legislature support increased property rights protections, there is likely to be enough political support to pass either a constitutional amendment or a statutory change. However, many states require a two-thirds majority vote in both houses to place constitutional amendments on the ballot, setting a high bar for the political support necessary to pass a constitutional amendment. In addition, similar to the general public, some state legislators may also be resistant to the concept of amending the state Constitution, regardless of the issue at stake.

- ***The temperament of the state judiciary***: State courts will vary in the extent to which they impose implicit limitations on the ability of the citizenry or the legislature to amend the Constitution. For example, Oregon's courts have historically taken a dim view of attempts by state voters to amend the Constitution via the initiative process.

The strategy behind Measure 37 provides a useful example of the decision-making process. Faced with an amendment-averse court system that had already struck down Measure 7, as well as a legislature historically unwilling to enact meaningful regulatory takings reform, Measure 37 proponents chose to take their measure directly to the voters via the direct initiative process to maximize their chances of successful passage. Proponents of regulatory takings measures in other states will need to carefully assess the context and history of their state to make a pragmatic decision on the best way to move forward.

2. "Measure 37" or "Kelo-Plus"?

In the wake of the U.S. Supreme Court's ruling in *Kelo vs. New London* on eminent domain, dozens of states have taken steps toward enacting reforms aimed at restricting the exercise of the eminent domain power to a narrower set of justifiable circumstances. At the same time, legislators and activists in several states have indicated interest in what have been called "Kelo-Plus" measures that combine, in one comprehensive set of statutory changes, increased protections against physical takings via eminent domain with increased protections against regulatory takings along the lines of Measure 37.

The advantages of pursuing a "Kelo-Plus" measure are several. First, it offers a single vehicle to address both physical and regulatory takings at the same time, effectively "killing two birds with one stone." Second, it capitalizes on the tremendous public and political momentum generated in the aftermath of the *Kelo* ruling to enhance the protection of private property rights. Finally, it

affords a chance to educate the public that, while private property rights are certainly endangered by eminent domain abuse, these rights are also threatened in a greater and more frequent (but less visible) way by the excessive and unfair burdens that can be imposed by regulation.

However, states like Alabama, Texas, and South Dakota have already passed stand-alone eminent domain reform bills, and others are likely to follow suit in the near future. Hence, a combined "Kelo-Plus" approach may not be appropriate in some states.

3. Retroactive or Prospective?

Another important decision in designing a regulatory takings measure is whether it will apply retroactively to regulations already in effect at the time that the measure becomes law or prospectively to any new regulations passed in the future.

In Oregon, Measure 37 was designed to cover both new regulations adopted by state and local governments as well as those that are already on the books, given that state's unique situation of having in place a far-reaching, decades-old land use regulation system. In addition to protecting landowners from the impacts of future regulation, Measure 37 proponents wanted to provide some relief for those who have borne the financial burden of losing value and use of their properties due to regulation.

However, most states have been far less aggressive than Oregon in extending their regulatory reach through land use controls, so it may make more sense for proponents in other states to design regulatory takings measures on a prospective basis, unless there is a particularly egregious regulatory situation in their state that they seek to address.

There are several advantages to a prospective-based measure:

- ***Minimal immediate/retroactive fiscal impact***: It is harder for opponents to claim that a prospective-based measure would generate a fiscal impact—if governments do not impose any new regulations that infringe on property owners' rights, then the measure will not impose direct costs to government. By contrast, the fiscal impact statement produced by the Oregon Department of Administration for Measure 37 suggested that administrative costs alone (not including landowner compensation costs) could total over $300 billion, which provided opponents with a ready-made rhetorical argument against the measure.
- ***Government Accountability and Recognition of Budget Trade-offs***: A prospective-based regulatory takings measure would effectively oblige government to consider a wider range of financial impacts associated with future regulations and either forego the regulation or plan for new costs in their budgets. For example, if a municipality decides to create open space on privately owned land through new, restrictive zoning regulations, then it will have to make difficult budget trade-offs in order to take this land to create this open space. Instead of expecting private property owners to bear the costs for the benefit of the community-at-large, governments would have to use public money to ensure that everyone pays his fair share. And

given the likely difficulties in generating new revenue sources to fund landowner compensation, elected officials will have an incentive to be more selective about the regulations they consider for adoption. Should they choose to move forward with new regulation, they will then face difficult decisions on budget priorities to make room for any related new costs.

- ***Conceptual Simplicity***: A prospective-based measure is clear and easy to understand. The underlying concept is simple: if government wants to adopt a regulation that reduces the value of privately owned land, then it will need to compensate landowners for that impact. The idea also closely parallels the government use of eminent domain, a concept that has become familiar to a large segment of the public as a result of the *Kelo vs. New London* decision. By removing the potential for public concern and confusion about how to handle historical regulatory impacts, it becomes easier for proponents to distill their basic message and communicate to voters that government should be responsible for the consequences of the actions it takes.

4. The Scope of Regulations Covered

A critical aspect of drafting a regulatory takings measure is to clearly establish the full scope of the regulations covered under the measure and what, if any, exceptions should be included. For example, Measure 37 specifically defines the following list of "land use regulations" that are subject to its compensation provisions:

- Any statute regulating the use of land or any interest therein;
- Oregon Department of Land Conservation and Development administrative rules and goals[33];
- Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;
- Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and
- Statutes and administrative rules regulating farming and forest practices.

From a legal perspective, it is important to be as clear and specific as possible when drafting the list of regulations covered to make clear to the courts the full range of regulations encompassed by the measure. Any ambiguity in this regard could lay the groundwork for future legal challenges.

It is equally important to be clear on what regulations are not covered under a regulatory takings measure. For example, Measure 37 explicitly exempts the following types of activities from being subject to its provisions:

- Regulations prohibiting historically recognized public nuisances under common law;
- Public health and safety regulations, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

- Land use regulations enacted in compliance with federal law;
- Restrictions on the use of a property for pornography sales or performing nude dancing; and
- Regulations enacted prior to the date of acquisition of the property by the owner (or a family member).

These exemptions were selected for a variety of philosophical and pragmatic reasons. From a political and policy standpoint, many people would object to a landowner building something on his property that violates a building or structural code, endangers the occupants of a building or neighboring property owners, or violates sanitation or hazardous waste codes.

From a common-sense standpoint, it also makes sense to add a nuisance exception for things that would typically be considered nuisances under common law (such as discharging polluted water into a stream), as well as a provision that state and local governments should not be required to pay for regulations that they were required to adopt under federal law.

But perhaps the most significant exception is that Measure 37 only applies to regulations adopted after the owner or their family members purchased their land. This exemption is based on the notion that the goal of a regulatory takings proposal should be to give people the benefit of their bargain—to give them what they purchased when they bought their land—under the assumption that the price they paid for the property reflected its zoning at the time and the types of uses that were allowed on it.

5. The Choice of Remedy

Regarding remedy options, proponents of regulatory takings measures will need to decide whether they want to pursue a pure compensation measure that offers payment to aggrieved property owners or whether they want to also offer government the alternative of issuing a waiver—which removes, modifies, or fails to enforce a regulation—to give property owners their rights back.

From a financial perspective, allowing both compensation and waivers as remedies gives the most flexibility to government in how it addresses valid regulatory takings claims. Under Measure 37, cash-strapped cities and counties have chosen to issue waivers to settle most of the claims processed to date, ensuring that property owners are granted the rights they received when they originally bought their property, while simultaneously giving government an option to avoid monetary liability. However, measure proponents in some states may find deregulation to be the preferred option as a means to effectuate a regulatory pullback, rather than offering a compensation remedy that would keep the existing regulatory regime in place.

In considering the choice of remedies, it is important to remember that the goal of a regulatory takings measure is to restore property rights, not to dictate or mandate a particular approach or program. From a property rights perspective, it matters less whether rights are restored via compensation or deregulation than if they are restored at all.

6. Transferability of Waivers

Any regulatory takings measure should expressly provide that property rights that are reinstated as an alternative to compensation are transferable to future property owners. This will allow any claimant that is awarded with a waiver from the government to be able to pass that waiver on to subsequent owners; otherwise, waiver remedies under the measure would essentially be useless as they would fail to enhance property resale value.

Measure 37 did not include a transferability provision, generating market uncertainty and setting the stage for legal challenges. In the spring of 2004, Oregon's Attorney General issued an opinion that when a local government decides to modify, remove, or not apply (i.e., waive) a land use regulation under Measure 37, that waiver is personal and only valid for the owner making the claim and cannot be transferred to subsequent owners. The issue is now being debated in the courts. If the courts determine that waivers are not transferable, state and local governments are more likely to grant waivers in lieu of compensation because waivers will likely be short-lived, since a different land use will be permitted only as long as the current owner holds the property.[34] Another possible and unintended result of a "no transfer" rule is that it could create an incentive for development where it might not otherwise occur, since that would be the only way for landowners to extract the previously unrealizable property values provided by Measure 37.

7. Avoiding Constitutional Pitfalls

In drafting a regulatory takings measure, it is important to include language that provides that the remedies created under the measure are outside of and not intended to alter or modify any of the remedies available to affected landowners under the Takings Clause of the state or U.S. Constitutions. If the measure tries to define the scope of rights and protections in statute that a constitutional section already provides, then the statutory change runs the risk of being struck down as unconstitutional because it would intrude into a province of the judiciary, which is responsible for interpreting the Constitution.

By inserting language into the measure saying that the remedy created in the measure is in addition to and in no way modifies any citizens' rights under the Takings Clause of the U.S. or state Constitution, it becomes clear to the courts that there are now two ways of redress: there are rights guaranteed by the Takings Clause in the state and U.S. Constitutions, and there is the new set of separate, additional rights guaranteed by the measure.

It is also important for measure drafters to examine the "single subject" or "separate votes" provisions in the state Constitution to ensure that a proposed regulatory takings measure would not violate them. Most states prohibit logrolling (bundling popular bills with unpopular ones) through "single subject" requirements mandating that a legislative bill only address one subject. In states with the citizen initiative process, these rules generally apply to both the initiative and to legislative bills. Similarly, "separate votes" requirements prevent any constitutional amendment that involves two or more changes to the Constitution that are substantive and that are not closely

related. The Oregon Supreme Court invalidated Measure 7 (Measure 37's predecessor) on "separate votes" grounds. Each state has a different view and different body of case law on when a measure or amendment constitutes more than one subject.

8. Eliminating the "Ripeness" Requirement

In designing a regulatory takings measure, it is important to eliminate the opportunity for government to create a "ripeness" requirement—the requirement that property owners must submit a series of applications to the local government for different uses of their property and get those denied before they can file a claim and enter into litigation.

A "ripeness" requirement would constitute one of the biggest impediments to the filing of compensation claims, even for clients with legitimate grievances. If property owners were required to submit a variety of applications for different uses of their property as a pre-condition of filing a claim, they would face thousands of dollars in application fees to the government that cannot be recovered, as well as attorney's fees and expert time.

Hence, it is important to specify within the regulatory takings measure that, prior to making a claim, the property owner is not required to submit applications to the zoning authority to determine what uses can and cannot be used on the property. The determination as to whether or not there is a legitimate claim will be based on evidence offered at trial.

It is also good practice to give the government some amount of time after a claim is tendered to decide how to handle the claim itself. This gives the state or local government the option of trying to resolve the claim short of litigation. Measure 37 specifies a 180-day window, though proponents of regulatory takings measures in other states could opt to specify a longer or shorter window.

9. Government Flexibility in Designing a Procedural Process

Drafters of a regulatory takings measure may decide to either create a procedural process directly in the measure or simply provide, as Measure 37 did, that the local or state government can create its own process for handling claims.

The advantage of allowing state and local governments to create their own processes is that it preserves their ability to decide how best to handle each individual application and create a procedural process that suits the needs of their constituents. In order to prevent governments from creating processes or requirements that would serve to discourage property owners from filing claims—such as exorbitant filing fees or excessive documentation requirements—Measure 37 included a provision that property owners can, but are not required to, follow the state or locally established process if they don't choose to. Owners can simply file their claim, wait the requisite amount of time for the local government to act upon it, and file a lawsuit at the end of that period if they are dissatisfied with the outcome.

This approach balances the desire to offer governments flexibility in Measure 37 implementation while ensuring that property owners will retain the ability to engage in litigation if their claims are not acted upon in a diligent manner.

The drafters of Measure 37 learned a lesson from previous experience with Measure 7 in Oregon. A number of local governments created Measure 7 application fees high enough to present a significant hurdle for property owners interested in filing claims. The city of Beaverton, for example, required property owners to pay a $50,000, non-refundable application fee to make a claim under Measure 7. If citizens are required to follow government-established processes to file claims, then they can effectively be held hostage by regulators whose main incentive is to minimize the number of claims.

To avoid that situation, Measure 37 included language in the measure that gives state and local governments the ability to create their own procedural process, while at the same time incorporating a provision that ensures property owners can still file a lawsuit even if they have not gone through the government's procedural process.

The main disadvantage of specifying a procedural process in a measure for governments to follow is that it would open the door to legal challenges against the measure on the grounds of due process violations. If the measure does not prescribe the process, any complaints about the procedural process would need to be leveled at the government entity that created it, not at the measure itself. A regulatory takings measure that offered governments the flexibility to determine their own procedural processes would carry the implicit assumption that state and local officials will carry out their oaths of office and uphold the Constitution, which requires them to provide both substantive and procedural due process to anyone with a property interest.

10. Including a One-Way Attorney's Fee Provision

To ensure fairness to property owners, it is recommended that a regulatory takings measure include a one-way attorney's fee provision so that property owners will be entitled to recoup their attorney's fees if they are found to have a successful claim. However, if the property owner is unsuccessful, then the government would still be required to pay its own attorney's fees.

With a one-way attorney's fee system, the only liability that the property owner will possibly incur is the cost of his own legal fees if his claim is unsuccessful. By contrast, a two-way attorney's fees system where the prevailing party gets to recoup legal fees will create a disincentive for property owners that could discourage them from filing claims.

11. Including a Severability Clause

Many state codes provide that if part of a statute is found to be unconstitutional, then the courts can sever that part while keeping the constitutional portions of the statute in place. Likewise, it is good

practice to include a severability clause in a regulatory takings measure that states that if any portion or portions of the measure are declared invalid by a court of competent jurisdiction, then the remaining portions of the measure shall remain in full force and effect.

B. Strategic Considerations: Lessons Learned from Measure 37

In addition to the policy considerations outlined above, the following sections outline several strategic issues for proponents to consider as they work to build public and political support for a state regulatory takings measure.

1. Identifying Victims: The Human Face of Regulatory Takings

In terms of messaging and making an impression on voters, one of the central lessons learned from the Measure 37 campaign was that it is essential to find a human face—or series of faces—to associate with a regulatory takings measure. Instead of explaining the concept of regulatory takings to voters in the abstract, being able to highlight a visible "victim" whose property rights have been taken from him via regulation offers two strategic benefits: (1) it can help measure proponents craft a powerful message that resonates with voters, as it conveys to them that their own property rights are not immune from regulatory takings; and (2) it conveys a legitimate message about the importance of protecting the minority against the abuse of the majority, a well-established concept in the national consciousness.

In the campaign for Measure 37, the plight of 91-year old Multnomah County property owner Dorothy English demonstrated the threat posed by regulatory takings in a way that resonated strongly with voters. Heavily featured in pro-Measure 37 political ads and described as the "poster child" for the measure, Ms. English and her husband purchased their 20-acre property in 1953, planning to someday subdivide the property, give some of it to their children and grandchildren, and sell the remainder to fund their retirement. Multnomah County subsequently zoned their property as commercial forest land, preventing its subdivision, even though there are no commercial timber operations anywhere in the vicinity. Legislation meant to help English subdivide her land was vetoed in 2003 by Gov. Ted Kulongoski, who felt that a better approach would be to address land use issues in broader manner.[35]

English's message to voters in the Measure 37 campaign was simple and effective: "I'm 91 years old, my husband is dead and I don't know how much longer I can fight…I've always been fighting the government, and I'm not going to stop." In March 2005, as a result of Measure 37's passage and implementation, Multnomah County officials granted Ms. English her long sought-after right to subdivide her property.

Measure 37 proponents found that trumpeting stories like those of Dorothy English and other regulatory takings victims was critical to their success at connecting with voters. They used a cross-section of aggrieved property owners—rural and urban, from a variety of walks of life—to

present a broad range of personal experiences with regulatory takings that voters could identify with.

And in states without a tradition of heavy-handed land use regulation like Oregon's, presenting personal stories to voters becomes even more critical in messaging. According to Oregonians in Action President David Hunnicutt, many people believe that the federal and state Constitution already protects their property rights, so "having a series of people from that particular state saying, 'I bought my land and here's how government took away my property rights' goes a lot farther than hiring an expert to come in to present a white paper on the regulatory takings issue."[36]

2. Staying on Message

The viewpoint espoused by the traditional opponents of regulatory takings reform—environmental advocacy groups, urban planning professionals, and government entities—is inherently negative, premised on the notion that if government does not regulate citizens, then they will make unwise or socially detrimental decisions.

However, proponents of regulatory takings measures will likely find that a positive message resonates more strongly with voters. It is important to emphasize that we live in a society where the assumption is that when given freedom, choice, and opportunity, most individuals act properly. In this view, the purpose of regulation is to address widespread abuses and the occasional situations in which individuals make decisions that run counter to the interests of the community-at-large. Hence, it is inherently unfair for government to regulate away the ability of landowners to use their property in the ways that were legal at the time they purchased it.

Given the complexity of the regulatory takings issue, it can be difficult to craft a succinct message in soundbite form to deliver to voters. To do so often requires a mixed message. Measure proponents will first need to focus on the negative—the idea that regulatory takings are harming the lives and livelihoods of average citizens. But this message will then need to be followed by the positive message that a regulatory takings measure will stop these regulatory abuses from happening. In their campaign, the proponents of Measure 37 found that this can be a difficult transition to make in a 30-second television commercial; the transition becomes somewhat easier in a 60-second radio advertisement.[37]

The Measure 37 campaign used polling to develop a simple message that resonated strongly with voters and did not deviate from that message, despite the attacks leveled by opponents against it. According to Oregonians in Action President David Hunnicutt, the message was simple: "Here's what happened to regulatory takings victims. This isn't fair. It's your property. It's your hard work. It's your investment. Nobody should take that from you without compensation, especially government."[38]

Given the overwhelming public backlash against the U.S. Supreme Court's *Kelo vs. New London* decision on eminent domain and the attention it drew to the frailty of private property rights, it is

reasonable to assume that a similar message in other states would also have a tremendous popular appeal.

3. Forming Strategic Partnerships

Measure 37 was the product of years of efforts to address regulatory takings associated with Oregon's statewide land use planning system by the nonprofit property rights advocacy group Oregonians in Action. Yet, there are few similar groups in other states that are engaged in direct lobbying for property rights reform at the state level because most states lack the regulatory aggressiveness of Oregon.

Hence, proponents of regulatory takings measures in other states may need to form strategic partnerships with other types of advocacy groups to advance the cause and help build a broad base of public support. Taxpayer advocacy groups can be a powerful ally in this regard, as they share a common goal of protecting individual and political freedoms and reducing the size and scope of government. Taxpayer groups also tend to have large donor bases, extensive grassroots networks, and well-established clout in media and political circles.

Agricultural groups—such as farm bureaus, cattlemen's and ranching associations, and granges—are also natural allies that measure proponents can partner with to build public support, as they tend to believe strongly in the protection of property rights. In terms of public option, rural, agricultural-based organizations tend to elicit a sympathetic reaction from voters because their messages often invoke nostalgia for earlier, simpler times.

Finally, homebuilder associations have a natural interest in property rights protections, usually have large member bases, and are often quite active politically. However, it may be prudent to avoid having homebuilder groups directly lead the push for a regulatory takings measure in order to avoid opposition claims that homebuilders are less interested in protecting citizens' property rights than in reaping financial rewards that benefit their industry.

Part 5

Separating Myth from Fact About Measure 37

Since it was first proposed, Measure 37 has generated a great deal of opposition from environmental advocacy groups, urban planning professionals, farm bureaus, and other groups interested in maintaining the status quo of land use regulation in Oregon. It is useful to examine the key myths propounded by Measure 37 opponents in Oregon, as it is likely that similar measures in other states would generate similar arguments in opposition.

A. Myth: Measure 37 Decimates Land Use Regulation

Perhaps the most commonly voiced arguments against Measure 37 among opponents are that its real aim is to subvert Oregon's land use laws and that it will result in endless sprawl and land use conflicts.

However, Measure 37 does not apply to all land use regulations; in fact, it constrains the definition of local “land use regulations” to include the following: (1) “comprehensive plans,” “zoning ordinances,” “land division ordinances,” and “transportation ordinances”; and (2) metropolitan service district regional framework plans, functional plans, planning goals and objectives.

Measure 37 also does not prohibit the state of Oregon and/or local governments from adopting laws that regulate public health and safety. It specifically excludes statutes and regulations such as fire codes, building codes, health codes, sanitation codes, solid waste and hazardous waste regulations, pollution control regulations, and traffic safety regulations from being subject to Measure 37's protections. Measure 37 also includes an exemption from claims on behalf of pornography vendors and nude dancing establishments.

In fact, proponents counter that Measure 37 actually completes the implementation of Oregon’s land use planning system, given that the original S.B. 100 included provisions to study and create a compensation element that would offer landowners protection from the loss of property values that would inevitably result from statewide land use planning.

Since Measure 37's passage, it is clear that fears that its implementation will lead to rampant sprawl and land use conflicts have been overblown. In the first four months after the state's Department of Land Conservation and Development began issuing final orders on Measure 37 claims in mid-2005, land use changes that differ from current zoning were approved on only 13,400 acres of land.[39] If current trends continue and successful claims are approved at a rate of 40,000 acres per year, then after ten years, the use of only 400,000 acres out of the state's 61.5 million acres (or roughly 0.5 percent) would be changed.[40] This is likely to be an overestimate, given the long-term ownership requirement that limits the number of potential claimants, the two-year window on filing compensation claims, and the low likelihood that claims will continue to be approved at current rates.

In addition, while some large development claims have been filed, many of the approved land use changes to date would simply allow owners to build one or two residences on currently zoned farmland. Also, some successful Measure 37 claimants have found that other types of land use restrictions have prevented the degree of new construction initially sought in their claims. Hence, the experience with Measure 37 to date suggests a low potential for dramatic changes to Oregon's landscape.

Despite the low potential for widespread new development as a result of Measure 37, it is important to note that the intent of the measure is neither to dismantle Oregon's land use planning system nor to provide a remedy for all property devaluations that have resulted from its implementation. Rather, it provides a better balance between private and public interests by ensuring that state and local governments adequately weigh the costs and benefits of public action. The successful passage of Measure 37 suggests that a majority of voters recognize the disproportionate burden borne by the minority of landowners in the state's aggressive pursuit of its growth management goals. Without an adequate check on government power, there is little incentive for government to consider all the costs and benefits of its actions. Viewed in this light, Measure 37 represents a mechanism that helps to balance property rights and governmental action in the public interest and creates a new incentive structure that governments face when contemplating new regulation.

B. Myth: Measure 37 is Costly and Complex

Another set of arguments leveled against Measure 37 is that it would be costly and complex to administer and that compensation claims could total untold billions of dollars, for which Measure 37 provides no funding mechanism. Prior to its passage, the Financial Impact Statement from Oregon's Secretary of State and State Treasurer estimated that Measure 37 will result in direct administrative costs of $64 to $344 million per year at the state and local level.[41] This figure did not include the costs of compensating property owners for successful claims.

Opponents also argue that Measure 37 will necessitate new processes, procedures and paperwork for every government in the state. More than 300 local governments and state agencies will need to

create administrative processes to handle claims, and each claim could require complex research, costly appraisals and legal review.

On the surface, the claim that implementation of Measure 37 will impose significant costs on state and local governments seems to hold merit. Measure 37 did not establish a funding source to compensate those property owners found to have legitimate regulatory takings claims, nor did it allocate funding for related government administrative costs or legal fees. But in practice, state and local governments have favored waiving regulations rather than compensating successful claimants, limiting the cost burden they bear under Measure 37.

In addition, Measure 37 offered state and local governments an opportunity to devise their own methods of generating compensation funding should they choose to, rather than imposing a "one-size-fits-all" funding mechanism. For example, one proposal advanced by the property rights advocacy group Oregonians in Action would be to create a Measure 37 compensation fund by capturing a portion of any increased state capital gains tax and property taxes that accrue to local governments when property owners are allowed to develop their land under Measure 37.[42] This would prevent the use of existing general fund dollars to compensate landowners and would effectively use revenue generated as a result of Measure 37 to create a compensation fund.

Viewed within the context of Oregon's statewide land use planning system, it becomes clear that Measure 37 is not the true source of "new" costs. Rather, the costs result from the attempt to adhere to the state's burdensome regulatory scheme, under which individual property owners—not taxpayers-at-large—have paid the price of providing the public benefits associated with land use regulation. In this way, Measure 37 can be seen as simply having revealed the hitherto hidden costs of the state's heavy-handed approach to land use regulation and redirected these costs in a more equitable and just manner that respects the American tradition of strong private property rights.

Similarly, the "burdensome process" argument also disappears when placed into the context of Oregon's current planning system, as private property owners whose development rights have been regulated away via zoning, environmental overlay zones, and various other means have for decades faced lengthy and costly regulatory and legal battles to try and reinstate rights existing at the time they purchased their properties.

As a coalition of state senators wrote prior to Measure 37's passage:

> *By allowing state and local government to return the property rights they have taken from Oregonians instead of paying compensation, Measure 37 allows Oregonians to use their land to create jobs, boost property and income tax revenues, and help fund essential government services. And this is all accomplished not through raising taxes, but by putting more faith in people and the private sector.*[43]

C. Myth: The Measure 37 Claims Process is Arbitrary

Opponents have also complained that the Measure 37 claims process is arbitrary since the measure provides no standards for how government decides who gets paid and who doesn't. According to this logic, government can decide one thing for your neighbor's property and another thing for yours. However, given the context-specific and piecemeal nature of real estate market activity and land use decision-making, it is unreasonable to assume that one uniform set of standards could be devised that would be applicable in evaluating what will likely prove to be a myriad of complex Measure 37 compensation claims.

In a larger sense, rather than creating unfairness among property owners, Measure 37 can be seen as an effort to correct for the unfairness that results from traditional zoning, where some property owners are limited and others are not. Through such mechanisms as urban growth boundary designations, variances, rezoning requests, governments already have the ability to make case-by-case land use decisions that impact surrounding neighbors.

Measure 37 proponents also counter that the measure gives every property owner exactly the same right: the right that he had to develop his property at the time he bought it. Rural property owners who bought their land prior to the adoption of Oregon's statewide planning system paid value for their land based on the expectation that their land could be used in the variety of ways allowable at the time. Since those uses were subsequently limited by land use regulations resulting from S.B. 100, and rural property values artificially lowered relative to developable areas within urban growth boundaries, rural property owners can be seen as effectively subsidizing the value of urban properties. So in this sense, Measure 37 represents a mechanism by which rural property owners can end this land value subsidization and recover the value that was taken from them by regulation.

Measure 37 does create some degree of uncertainty in the real estate market since the use and value of land is now less predictable, although, as noted earlier, the overall impact of the measure is likely to be relatively benign. As a result of Measure 37, some properties, particularly those held in single ownership or passed down from previous generations, may have more development potential and value than a neighboring property purchased more recently. More recent property owners could potentially experience decreased land values because their neighbors may be able to create conflicting non-conforming uses. The value of any given piece of property will be contingent on a variety of unknowns associated with surrounding properties, such as ownership history, the owner's plans, the jurisdiction's ability to pay compensation for successful claims, or, alternatively, the manner in which the jurisdiction chooses to avoid compensation.

And real estate professionals will likely be of little assistance offering sound guidance on the potential for Measure 37-related issues for prospective property buyers and sellers, as realtors face professional and legal constraints against even discussing the issue with clients in light of potential liability issues.[44]

But as noted earlier, uncertainty and case-by-case decision-making is also part and parcel of the current planning system. Measure 37 is just a more easily identifiable source of market uncertainty than the complex web of state and local planning regulations that have driven property values for decades. Prior to Measure 37's passage, property owners had little protection from arbitrary regulatory changes by the government, given the expanding reach of Oregon's land use planning system over the last 33 years.

By creating the incentive for governments to account for the economic impacts of land use regulation on private property, Measure 37 represents a model for regulatory reform in other states. Public discontent with Oregon's legacy of land use regulation, as evidenced by a majority of voters approving Measure 37, illustrates the need to protect property rights and the hazards of not addressing them through the political process. Oregon's experience suggests that modern urban planning and land use regulation in the United States may not be sustainable without strong property rights protections.

D. Myth: Measure 37 Will Harm Agriculture

Though most of Oregon's County Farm Bureaus supported Measure 37, some opposed it on the basis that it would hurt farmers by leading to increased taxes and rolling back safeguards that protect Oregon farmland from over-development. Fifteen farm bureaus worked to defeat Measure 37, believing that it would jeopardize their livelihood and their legacy by opening the door to massive farmland conversion.

But given that very few property owners have held land long enough to make significant compensation claims, fears of widespread conversion of farmland to more intensive uses would appear to be exaggerated. For example, many of the Measure 37 claims made to date involve property zoned for "exclusive farm use," a restriction created in 1982 that prevents the subdivision of land into less than 80-acre parcels. However, under Measure 37, rural property owners who purchased their land after 1982 would not be able to subdivide their land into parcels smaller than 80 acres, greatly limiting the potential for large-scale conversion of agricultural land.[45]

Concerns about agricultural productivity also drive fears about Measure 37's impact. This sentiment is perhaps best expressed in an April 13, 2005 letter to the editor of the *Statesman-Journal*:

> *Will someone please tell me where our food will come from in a few short years? If our state and county officials keep allowing private homes and big industry to build in the middle of our farmlands, we will be out of food before long.*[46]

Concerns about Measure 37's potential impact on farmland conversion exemplify the perceived conventional wisdom about farmland, open space, and the pace of urbanization in the United States that is at odds with actual land use and agricultural productivity trends. Only around 6 percent of the nation is urbanized, and most states have more than three-quarters of their land devoted to

rural, agricultural, and open space uses.[47] There is little evidence to suggest that the nation or individual states face a farmland shortage or crisis.

In fact, agricultural productivity is at an all-time high and is becoming less dependent on land. Capital equipment and technology account for more than two-thirds of agriculture's productivity, while land accounts for about 18 percent of agricultural productivity and has been declining.[48]

High agricultural productivity, technological innovation, and rising world food production increase competitive pressures on small-to-mid-size family farms. Those farms that are unable to compete in an increasingly competitive marketplace are thus hamstrung by Oregon's heavy-handed land use regulations that prevent them from seeking alternate uses for their farmland.

For many farmers, their land's potential use is an important source of wealth, and when restrictions are placed on land use, land values and the owner's wealth change accordingly. Those farmers strongly motivated by preserving a pastoral way of life may desire strong farmland preservation measures, but this result comes at the price of restricting the rights of other farmers to determine the best use of their land. Aside from the severe financial impacts on these farm owners, the real estate market distortions produced through attempts to prevent farmland conversion also often result in significant, negative social welfare effects, such as rising housing prices.

E. Myth: Measure 37 Will Invite Endless Litigation

Prior to its passage, opponents argued that Measure 37 is too complex and vague and that it will result in numerous legal challenges that will cost taxpayers and flood the courts with litigation. This line of argument was given life by a July 2004 memorandum issued by the Oregon Attorney General's Office that warned of legal ambiguities, uncertainty, and several sources of "significant dispute" in Measure 37.[49]

But since the passage of Measure 37, and with thousands of claims submitted in the first year of implementation, only 31 lawsuits related to Measure 37 had been filed as of late October 2005. These lawsuits consist of:

- 23 lawsuits challenging claim decisions that were filed by claimants;
- Two lawsuits challenging claim decisions that were filed by neighbors of claimants;
- Four declaratory judgment actions regarding the interpretation or application of the measure; and
- Two cases contesting the constitutionality of the measure.[50]

In the most significant legal action to date, *MacPherson vs. Department of Administrative Services*, the environmental advocacy group 1000 Friends of Oregon, in coordination with seven landowners and five county farm bureaus, challenged Measure 37 on a variety of constitutional grounds. Specifically, their lawsuit argued that Measure 37 gives a privileged class of property owners

special rights and violates numerous other constitutional protections regarding separation of powers, sovereign immunity, suspension of laws, compensation of religious institutions, due process, and freedom of speech.

In October 2005, a Marion County Circuit Court judge ruled for the plaintiffs in *MacPherson*, finding that Measure 37 violated five state and federal constitutional provisions. But Oregon's Supreme Court invalidated the Circuit Court ruling in February 2006 in a unanimous opinion, finding no constitutional violations. Chief Justice Paul DeMuniz wrote in the opinion:

> *Whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview. Our only function in any case involving a constitutional challenge to an initiative measure is to ensure that the measure does not contravene any pertinent, applicable constitutional provisions. Here, we conclude that no such provisions have been contravened.*[51]

According to James S. Burling, a property rights attorney with the California-based Pacific Legal Foundation, the Oregon Supreme Court's decision in *MacPherson* largely closed the door on constitutional challenges to Measure 37, and future litigation is likely to focus on individual claim determinations or on implementation-related issues.[52]

While more guidance and specificity within Measure 37 on such matters as state and local administration and claims-processing procedures might have offered a more concrete roadmap to the measure's implementation, it is now up to the courts to decipher the legislative intent of Measure 37 and the legislature to further refine the implementation parameters. And given the current set of lawsuits, as well as the possibility of legislative "fixes" to Measure 37, it is clear that the process of providing greater certainty to Measure 37 implementation and reducing the potential for future legal challenges is already underway.

Part 6

Conclusion

The national property rights movement has been galvanized in recent years by the passage of Measure 37 in Oregon and the widespread popular disenchantment and subsequent efforts by federal, state, and local governments to curb the abuse of eminent domain in the wake of the U.S. Supreme Court's *Kelo vs. New London* decision. Public recognition of the need to protect the constitutional rights of private property owners has never been higher.

As a response to the steady expansion in the scope of land use regulation, Oregon's Measure 37 represents a major advance for the national property rights movement by establishing a system that restores to private landowners the rights that had previously been taken away via regulatory action. Measure 37 also provides a check on government power by ensuring that state and local governments adequately weigh the costs and benefits of public action.

By learning from Oregon's experience with Measure 37 and following the guidance laid out in this report, citizens, activists, and elected officials across the nation can accelerate their efforts to develop statewide regulatory takings measures aimed at protecting private property rights from the expanding reach of government and preventing landowners from being forced to bear the hidden costs associated with government regulation.

Appendix A

Background on Oregon's Regulatory System: Setting the Stage for Measure 37

A. Land Use Regulation in Oregon

In Oregon, throughout the 1960s, a combination of rapid population growth, widespread public fears of California-style urban sprawl, and a perceived threat to the state's agricultural and forest land were the catalyst for passage of Senate Bill 10 (SB 10) in 1969, which required Oregon's cities and counties to develop comprehensive land use plans and zoning ordinances that conformed to 10 general goals. But SB 10 lacked both an effective enforcement mechanism and state technical assistance to local governments, and many cities and counties chose not to develop plans.[53]

In 1973, the Oregon legislature enacted Senate Bill 100 (S.B. 100), which corrected the flaws in SB 10 and established a far more extensive statewide land use planning system.[54] S.B. 100 created the seven-member, governor-appointed Land Conservation and Development Commission (LCDC) and charged it with establishing a new set of statewide planning goals and guidelines. These goals require the state's city and county governments to develop comprehensive plans that protect farms, forests, and other resources and that provide for community needs such as housing, recreation, and economic development.[55] LCDC was also given the responsibility of reviewing and approving local plans for consistency with the state planning goals. S.B. 100 also created the state Department of Land Conservation and Development (DLCD), which serves as the administrative arm of LCDC and administers the statewide planning program, provides grant funding and technical assistance to cities and counties, and develops new rules and regulations in response to changing land use laws and trends.

In addition to mandatory comprehensive planning and zoning, the other key feature of Oregon's land use planning system is a requirement that each of the state's 214 cities designates "urban growth boundaries" (UGB). UGBs are politically designated lines around cities beyond which development is either prohibited or highly discouraged in order to promote compact growth, efficient infrastructure provision, open space protection, and urban redevelopment and revitalization.[56] Each UGB is required by state law to include a 20-year supply of land for future residential development inside the boundary. While UGB supporters claim that they are an

effective tool at containing urban sprawl and promoting compact development, they have also been widely criticized for constraining the supply of developable land, putting upward pressure on housing prices, and reducing housing affordability.[57]

In addition to cities, counties and state agencies, Oregon's planning laws apply to special districts and regional governmental entities. The most prominent example of regional government in Oregon is Metro, which serves Clackamas, Multnomah and Washington counties and the 24 cities in the Portland metropolitan area. Metro was formed in 1979, when voters approved the transition from an appointed council of governments to an elected body.[58] Voters approved a home-rule charter in 1992 that established Metro as the primary regional land use and transportation planning organization for the Portland metropolitan area.

At its core, Oregon's approach to growth management is premised on the notion that the state has a strong interest in local land use decision-making. S.B. 100 created a new mechanism in which local government—the traditional regulator of private property—would be compelled by the state to address state and regional land use issues.[59] Former DLCD Director Richard Benner opined on the state-local government relationship in a 2000 interview:

> *My view is that the [statewide land use planning] program has always been fairly prescriptive outside the urban growth boundary. In fact, […] things are closely circumscribed out there—a state minimum lot size, a list of uses you can have, a set of criteria that are reflected in zoning ordinances,* ***it's almost as though the state has done the zoning****. [emphasis mine]*[60]

B. Key Criticisms of Oregon's Regulatory System

Though widely lauded in the urban planning profession as the model for the "smart growth" approach to growth management, Oregon's stateside land use planning system has generated a great deal of criticism over the last three decades. Since its adoption in 1973, S.B. 100 has withstood several attempts to repeal it or to weaken its provisions. Voters have defeated two referenda and a ballot initiative seeking to repeal S.B. 100 over the years. Dozens of legislative bills to weaken S.B. 100 have been introduced and defeated, and those that passed were ultimately vetoed by the governor.

The following sections summarize the main criticisms leveled against the Oregon system by property rights and taxpayer advocates[61]:

Oregon's Planning System Harms Private Property Rights

The primary complaint about Oregon's land use planning system is that individual property owners have been forced to bear an unfair financial burden in the state's pursuit of its growth management objectives. In restricting the use of private property in the "public interest," government regulation can dramatically alter the property's market value and impose an economic hardship on the owner.

The costs borne by property owners are significant. According to one state estimate, it would cost the state $5.4 billion annually to compensate landowners for the regulatory impacts of Oregon's planning system.[62] Viewed from the landowner's perspective, this figure approximates the uncompensated costs imposed on property owners by Oregon's system of land use regulation.

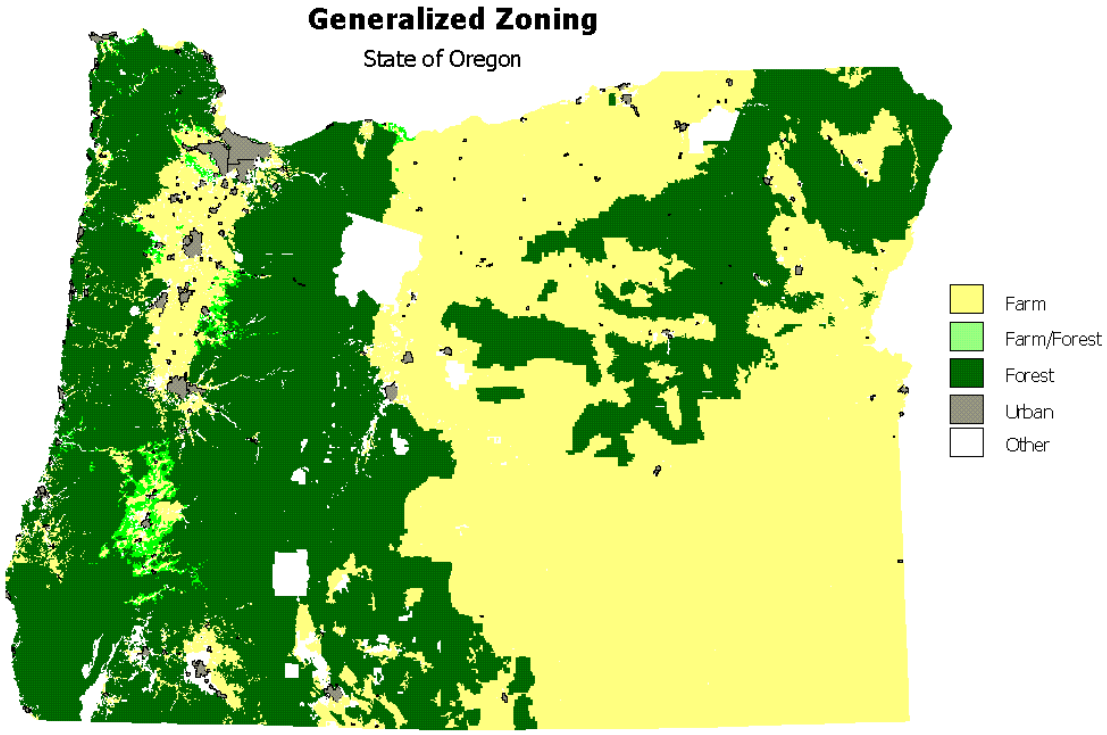
Oregon's planning system established urban growth boundaries (UGBs) around its cities, keeping development within these boundaries and placing strict limits on vast parcels of private agricultural and forest land outside of them. In effect, the system has created a set of winners (property owners inside UGBs that are able to develop their property within certain limits) and losers (property owners outside UGBs that are severely restricted in the use of their land).

UGBs have effectively created a dual land market: property values inside UGBs have artificially inflated, dampening the value of rural land barred from development. The relative changes in property values are tied to expectations by builders and developers about the likelihood the land could be developed for residential or commercial purposes. In that sense, property values have varied in accordance with the degree of local development restrictions.[63] Combined with increased land prices, UGBs create an artificial land scarcity that can reduce the supply of new housing to meet market demand and make housing less affordable.

The scarcity of land available for development becomes even more evident when viewed in aggregate. As illustrated in the figure below, over 95 percent of the state's total land mass is owned by government or is zoned for farm or forest use. Out of roughly 61.5 million acres of land in the state, nearly 26 million acres are zoned for exclusive farm or forest use, nearly 34 million acres are owned by federal, state, or local government, and 1.5 million acres are privately owned land within urban growth boundaries or in rural residential, commercial, or industrial zones.[64]

The rights of property owners within those 26 million acres zoned for farm or forest use have been severely curtailed. For example, owners of high-quality farmland in exclusive farm use zones are only allowed to build a single dwelling on their property if the land was farmed or forested and produced a minimum of $80,000 in revenue for two consecutive years (or three out of the last five years). The rules are slightly less stringent, though still prohibitive, on lower-quality farmland. Consequently, the DLCD found that in the five years before the income tests were put into effect, Oregon counties approved 1,378 new farm dwellings; in the first three years of implementation, counties approved only 332 new farm dwellings statewide.[65] It is clear from these data that the restrictions on development in agricultural and forest areas have stunted rural development across most of the state.

State of Oregon Generalized Zoning Map



Source: Oregon Department of Land Conservation and Development, General Zoning Map.
http://www.oregon.gov/LCD/images/statezon.gif

Interestingly, property rights were clearly acknowledged as an important part of the planning approach when S.B. 100 was passed. Many of the original proponents of the Oregon's land use planning system were concerned that its implementation could adversely affect some property owners. In 1973, Gov. Tom McCall introduced a companion bill to S.B. 100 that would have compensated landowners whose property rights were infringed upon by land use regulation, but this bill was ultimately tabled. Consequently, the final version of S.B. 100 included language creating an interim task force to study a compensation program and report back to the 1975 legislature, but the task force never reported back, and the legislature repealed this section of S.B. 100 in the 1980s.[66] Despite a series of studies of compensation alternatives and various legislative proposals during the 1970s and 1980s, none of these efforts resulted in the adoption of a compensation plan.

Hence, the tens of thousands of Oregon landowners that have suffered the downzoning and devaluation of their properties have had no recourse to recover the billions of dollars in unrealized value that was taken from them via regulation.

Some "Victims" of Oregon's Land Use Regulation

The experiences of the following landowners offer insight into the real-world impacts of Oregon's system of land use regulation on property owners.

Dorothy English, Multnomah County resident: Featured in pro-Measure 37 political ads and described as the "poster child" for the measure, Ms. English and her husband purchased their property in 1953, planning to someday divide the property, give some of it to their children and grandchildren, and sell the remainder to fund their retirement.

Nevertheless, Multnomah County subsequently zoned their property as commercial forest land even though there isn't a commercial timber operation anywhere in the vicinity. Despite a direct plea on Ms. Englishes behalf from Gov. Ted Kulongoski, the county refused to address the situation. Governor Kulongoski subsequently vetoed a bill that would have restored some of the rights the English's had when they first purchased the property. However, as a result of Measure 37's passage and implementation, Multnomah County officials granted Ms. English her long sought-after right to subdivide her property in March 2005.

Barbara and Eugene Prete, Sisters, Oregon residents: In 1990, the Pretes purchased property in the Sisters area with the intent to build a retirement home for them and their horses. At the time they purchased the property, the county routinely approved conditional use permits for non-farm dwellings on these types of parcels. However, in the early 1990s, approval of non-farm dwelling conditional use permits became more difficult under new state rules.

Despite their willingness to take substantial steps toward mitigating the perceived effects caused by their proposed home, the Pretes were unable to build a home on their property, even though they had that right when they bought the property. After filing a successful Measure 37 claim, the Pretes received state and county approval to build a house on their property.

Ollie Wilcox, Colton, Oregon resident: Ms. Wilcox is 75 years old and has owned eight acres near Colton, Oregon since 1965, assuming that this property would provide her and her late husband with a comfortable retirement in their senior years. She intended to subdivide the property into three parcels and sell two of them. Yet in 1979, Clackamas County zoned her land for farm use and adopted a five-acre minimum parcel size, despite the fact that (1) all of the other parcels surrounding her property are two- to five-acre parcels; (2) her property has typical urban services such as electricity, city water, access to the road, or fire protection; and (3) 39 of the citizens living within a quarter-mile of her property signed a petition supporting her subdivision application. Wilcox estimates that the zoning devalued her land by $175,000. According to Ms. Wilcox, "I've been widowed now for twelve years and I've saved this piece of ground to divide for my retirement. I'd like very much to go out of my last years being able to care for myself and that's why this was saved."

Ruth Pruitt, Portland resident: Ms. Pruitt purchased her 3.5-acre property in Portland over ten years ago. At the time of purchase, the land was appropriate for industrial or commercial development. In late 1993, the city of Portland began encroaching on the property using easements, zoning overlays, and environmental overlays. Because of the regulations imposed by the city, only one-half acre of the original 3.5 acres of land is actually usable. And further, the city of Portland requires 3.3 feet of wetland mitigation for every one foot of development. Hence Ms. Pruitt was forced to leave her property in its natural state.

2. Centralization and the Loss of Local Land Use Control

S.B. 100 created the most centralized land use planning system in the United States and significantly expanded government oversight in the land development process. Critics hold that centralization breeds dysfunction and prescribes a "one-size-fits-all" planning regime that can diminish local land use control, distance local citizens from decision-makers, and reduce the efficiency and representativeness of local government.[67]

3. Bureaucratic Unaccountability

The bureaucracy that operates Oregon's land use planning system has also been the subject of much criticism on the basis that it is unaccountable both to citizens and the legislature. One former Portland Metro planning director lamented the "unchecked policy expansion of a quasi-legislative body that is only accountable to one person:" the governor.[68] If legislators were to try and change the rules to limit the LCDC's authority, they would certainly face the prospect of a veto by the same governor that appointed the LCDC commissioners—who are presumably carrying out the governor's bidding—in the first place.

Appendix B

Text of Measure 37

The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.

(3) Subsection (1) of this act shall not apply to land use regulations:

(A) 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, 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.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this act.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(9) A decision by a governing body under this act shall not be considered a land use decision as defined in ORS 197.015(10).

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this act. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this

act. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) Definitions - for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

(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.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this act is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect.

Appendix C

State Initiative Processes

States Where Some Form of Initiative is Available	Date Process Adopted	Type of Initiative Process Available		Type of Initiative Process Used to Propose Constitutional Amendments		Type of Initiative Process Used to Propose Statutes (Laws)	
		Constitutional Amendment	Statute	Direct (DA)	Indirect (IDA)	Direct (DS)	Indirect (IDS)
Alaska	1959	0	X	0	0	0	X
Arizona	1912	X	X	X	0	X	0
Arkansas	1909	X	X	X	0	X	0
California	1911/66	X	X	X	0	X	0
Colorado	1912	X	X	X	0	X	0
Florida	1972	X	0	X	0	0	0
Idaho	1912	0	X	0	0	X	0
Illinois	1970	X	0	X	0	0	0
Maine	1908	0	X	0	0	0	X
Massachusetts	1918	X	X	0	X	0	X
Michigan	1908	X	X	X	0	0	X
Mississippi	1992	X	0	0	X	0	0
Missouri	1906	X	X	X	0	X	0
Montana	1904/72	X	X	X	0	X	0
Nebraska	1912	X	X	X	0	X	0
Nevada	1904	X	X	X	0	0	X
North Dakota	1914	X	X	X	0	X	0
Ohio	1912	X	X	X	0	0	X
Oklahoma	1907	X	X	X	0	X	0
Oregon	1902	X	X	X	0	X	0
South Dakota	1898/72/88	X	X	X	0	X	0
Utah	1900/17	0	X	0	0	X	X
Washington	1912	0	X	0	0	X	X
Wyoming	1968	0	X	0	0	0	X
Totals		**18 states**	**21 states**	**16 states**	**2 states**	**14 states**	**9 states**

Sources: What is Initiative & Referendum, I&R Fact Sheet Number One (Washington, D.C.: Initiative & Referendum Institute, 2005), http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/Handout%20-%20What%20is%20IR.pdf; Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions, (Washington, D.C.: Initiative & Referendum Institute), http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Almanac%20-%20Signature%20and%20SS%20and%20GD%20Requirements.pdf.

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Other Related Reason Publications

Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis, by Samuel R. Staley and John P. Blair, Reason Foundation Policy Study No. 331, February 2005. http://www.reason.org/ps331.pdf

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Urban-Growth Boundaries and Housing Affordability: Lessons from Portland, by Samuel R. Staley, Reason Foundation Policy Brief 11, October 1999, http://www.reason.org/pb11.pdf

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[1] ECONorthwest, *Evaluation of Measure 7*, Prepared for the Oregon Business Council, January 2001, p. 21. http://www.orbusinesscouncil.org/docs/measure7.pdf

[2] Henry N. Butler, "Regulatory Takings after Lucas," *Regulation* (Washington, D.C.: Cato Institute, 1993), Vol. 16, No. 3, http://www.cato.org/pubs/regulation/reg16n3g.html.

[3] For more on the topic of eminent domain abuse, see Samuel R. Staley and John P. Blair, *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis*, Policy Study No. 331 (Los Angeles, California: Reason Foundation, February 2005), http://www.reason.org/ps331.pdf. See also Dana Berliner, *Public Power, Private Gain* (Washington, D.C.: Institute for Justice, April 2003),

http://www.castlecoalition.org/report/pdf/ED_report.pdf.

[4] While eminent domain and regulatory takings are related concepts, it is important to make the distinction that eminent domain involves the physical taking of property (i.e., transferring ownership to the government); by contrast, regulation can restrict the use of property but does not transfer or deny ownership (except in extreme cases). Thus, in principle, regulatory takings can be reversed, with full rights restored to property owners.

[5] Government Accountability Office, *Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use*, GAO-03-1015 (Washington, D.C.: September 2003), p.6, http://www.gao.gov/new.items/d031015.pdf.

[6] Neil Meyer, *Introduction to Property Rights: A Historical Perspective*, University of Illinois Extension, April 4, 2006, http://www.urbanext.uiuc.edu/lcr/LGIEN2000-0006.html

[7] *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 43 S.C. 158, 67 L.Ed. 322 (1922). http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=260&invol=393

[8] Goodwin Proctor LLP, "Supreme Court Allows Takings Claim for Pre-Existing Development Restrictions," *Environmental Law Advisory* (Boston, Massachussetts: August 2001), p. 1, http://www.goodwinprocter.com/publications/ELA_preexistingclaims_8_01.pdf.

[9] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/438/104.html

[10] *Agins v. Tiburon*, 447 U.S. 255 (1980)

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[11] *Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. 2074 (2005)

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[12] Douglas W. Kmiec, *The Takings Clause*, WebMemo #843 (Washington, D.C.: Heritage Foundation, September 16, 2005), http://www.heritage.org/Research/LegalIssues/wm843.cfm

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[15] See discussion on legislative objectives for redefining property rights in John A. Humbach, "Evolving Thresholds of Nuisance and the Takings Clause," *Columbia Journal of Environmental Law*, Vol. 18, No. 1 (1993), pp.1-29. http://eprints.law.pace.edu/126/01/humbach18coljnlenvlaw1.pdf

[16] W. L. Pollard, "Outline of the Law of Zoning in the United States," *Annals of the American Academy of Political and Social Science*, Vol. 155, Part 2: Zoning in the United States (1931), pp. 15-33.

[17] Another purpose for zoning is an outgrowth of the progressive movement at the turn of the 19th century. Progressives believed that government should be an instrument for creating a better and more productive society. Modern urban planning is often considered part of the progressive and reform movement. Nevertheless, the justification for zoning and other development regulations flow more directly in a legal context from the police powers of government, which are rooted in common law and nuisance-based foundations for regulation.

[18] William G. Laffer, III, *The Private Property Rights Act: Forcing Federal Regulators to Obey the Bill of Rights*, Issue Bulletin #173, (Washington, D.C.: Heritage Foundation, 1992), http://www.heritage.org/Research/GovernmentReform/upload/90994_1.pdf.

[19] John A. Humbach, "Evolving Thresholds of Nuisance and the Takings Clause," *Columbia Journal of Environmental Law*, Vol. 18, No. 1 (1993), p. 9.

[20] Bernard Seigan, "Land Use Regulations Should Preserve Only Vital and Pressing Governmental Interests," *Cato Journal*, Vol. 10, No. 1 (1990), pp. 127-158.

[21] Ibid, p. 135.

[22] Oregon Department of Land Conservation and Development, *Department of Land Conservation and Development Goals*, http://www.lcd.state.or.us/LCD/goals.shtml, March 1, 2006.

[23] Eran Ben-Joséph, *Subdivision Regulations: Practices & Attitudes*, Lincoln Institute of Land Policy Working Paper, 2003, http://web.mit.edu/ebj/www/LincolnWP.pdf.

[24] Alan Altschuler and José Gomez-Ibanez, *Regulation for Revenue: The Political Economy of Land Use Exactions*, (Washington D.C.: Brookings Institution Press, 1993). Cited in Steven Hayward, "Planning for Profit," *Reason*, July 1994, http://reason.com/9407/bk.hayward.shtml.

[25] Robert Meltz, *Wetlands Regulation and the Law of Property Rights "Takings,"* CRS Report RL30423 (Washington D.C.: Congressional Research Service, 2000). http://www.cnie.org/NLE/CRSreports/Wetlands/wet-6.cfm#I.%20Brief%20overview%20of%20takings%20law

[26] Samuel R. Staley, "Zoning, Smart Growth, and Regulatory Taxation," in *Politics, Taxation, and the Rule of Law: The Power to Tax in Constitutional Perspective*, ed. Donald P. Racheter

and Richard E. Wagner (Boston, Massachusetts: Kluwer Academic Publishers, 2002), pp. 203-224.

[27] Carl Abott, Sy Adler, and Deborah Howe, "A Quiet Counterrevolution in Land Use Regulation: The Origins and Impact of Oregon's Measure 7," *Housing Policy Debate* (Washington D.C.: Fannie Mae Foundation, 2003), vol. 14, no.3, p. 384. http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1403_abbott.pdf

[28] Measure 37 can be seen as a response to regulatory takings and a corrective for the narrow judicial interpretations of the takings clauses in the federal and state Constitutions. For constitutional purposes, the term "takings" has a particular meaning that does not include all of the situations in which compensation is required under Measure 37. Compensation under Measure 37 can be awarded for regulatory impacts that may not be considered "takings" for constitutional purposes. For example, a landowner can submit a compensation claim under Measure 37 for any devaluation of his property resulting from the imposition of regulations, even if the landowner was still left with some economic use of the property. The courts have been far less lenient in making regulatory takings determinations, often ruling against landowners unless they have suffered a total, or near-total, loss of economic use of their property. It is also important to note that since Measure 37 is statutory rather than constitutional, it can be repealed at any time by the legislature. However, a constitutional guarantee under the takings clause cannot be changed except by constitutional amendment.

[29] John Harwood, "Poll Shows Division on Court Pick," *The Wall Street Journal*, July 15, 2005.

[30] Interview with David Hunnicutt, President of Oregonians in Action. January 11, 2006.

[31] Frank P. Grad and Robert F. Williams, *State Constitutions for the Twenty-first Century, Vol. 2: Drafting State Constitutions, Revisions, and Amendments*, SUNY Series in American Constitutionalism, (Albany, New York: State University of New York Press, January 2006), p. 3.

[32] *What is Initiative & Referendum*, I&R Fact Sheet Number One (Washington, D.C.: Initiative & Referendum Institute, 2005), http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/Handout%20-%20What%20is%20IR.pdf.

[33] The Oregon Department of Land Conservation and Development (DLCD) serves as the administrative arm of the governor-appointed Land Conservation and Development Commission. Its responsibilities include administering the statewide planning program, providing grant funding and technical assistance to cities and counties, and developing new rules and regulations in response to changing land use laws and trends.

[34] Jona Maukonen, "Transferring Measure 37 Waivers," *Environmental Law*, Vol. 36:177, 2006, p. 178.

[35] Laura Oppenheimer, "Lines drawn on land use put victory within reach," *The Oregonian*, November 7, 2004.

[36] Interview with David Hunnicutt, President of Oregonians in Action. January 11, 2006.

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[61] The criticisms mentioned here are far from exhaustive, as this report focuses primarily on issues of property rights and government accountability to citizens. The planning literature is ripe with critiques of Oregon's statewide land use planning system on the basis of its impacts on housing affordability, as well as the particulars associated with the implementation of specific policy tools (e.g., urban growth boundaries, transit-oriented development, urban densification, etc.).

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