Making Regulatory Takings Reform Work: The Lessons of Oregon’s Measure 37

by Alex Potapov

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Editors’ Summary

Oregon’s Measure 37 was an audacious attempt to create an expansive regulatory takings regime. Contrary to the hopes of its supporters and the fears of its opponents, however, it ultimately failed to provide any significant relief to property owners. The difficulties the Measure encountered can be traced to two primary causes; poor drafting and the hostile attitude of government officials. While these problems are likely to cause difficulties for any regulatory takings initiative, they are not necessarily insurmountable. It is also possible for a regulatory takings initiative to succeed in another way—by forcing the state government to take the problem of excessive regulation seriously. In this respect, Measure 37 has arguably been a success.

“I’ve always been fighting the government. Nothing has come easy with this measure.”
—A Clackamas County planner

In 2004, a 91-year-old woman named Dorothy English became the face of a “property rights revolution.” She was an Oregon landowner who had bought her property in 1953. Now, she was hoping to divide her 20-acre lot into eight parcels so she could give some to her children and grandchildren and sell the rest to fund her retirement.

Unfortunately for Ms. English, in the intervening decades, Oregon had developed its unique and stringent system of centralized land use regulation, and her property had been rezoned to prohibit such a subdivision. Her situation came to symbolize what many Oregonians perceived as the excesses of Oregon’s land use planning. These concerns gave rise to Measure 37, a citizen initiative that would seriously challenge Oregon’s approach to land use.

In broad outline, the Measure would require the government to compensate a landowner if her property lost value as a result of land use regulations enacted after she or a family member acquired the property; in the alternative, the government would be allowed to waive those regulations that were enacted after the landowner acquired the property. This was a significant departure from traditional takings principles; no other state had such a generous compensation provision.

Dorothy English became an effective spokeswoman for Measure 37, recording a memorable radio commercial in which she declared: “I’ve always been fighting the govern-

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ment, and I’m not going to stop!” Oregon’s voters responded to her story, and Measure 37 won an overwhelming 61% to 39% victory, carrying 35 of Oregon’s 36 counties.

A few months after Measure 37 was passed, Multnomah County granted Dorothy English the right to subdivide her property. The Measure’s libertarian supporters took this to be an indication of the Measure’s success. The opponents of Measure 37, meanwhile, saw a potentially disastrous disruption to Oregon’s land use system. One observer suggested that Measure 37 “has the potential to unravel over thirty years of valuable planning and compromise” and “insults the remarkable vision demonstrated by past generations of Oregonians in their ability to look beyond their immediate needs.” A pair of commentators called Measure 37 “a planner’s nightmare” that “has operated as a large-scale deregulatory measure, repealing land use regulations for select landowners.”

The number and character of the Measure 37 claims filed by Oregonians seemed to vindicate the skeptics. All in all, there were almost 7,000 Measure 37 claims, requesting a total of $19.8 billion in compensation. This included a large number of subdivision requests, and “several large claims by timber companies.” Measure 37 opponents believed that Dorothy English’s story “misled Oregonians into voting for a law that allows dramatic development.” As The Oregonian argued in an editorial entitled “Revealing the True Game Behind Measure 37,” the Measure “wasn’t so much about righting wrongs as it was about razing farms and forests and enriching developers.” Another article in the same newspaper noted that “[t]he measure didn’t just help ‘little old grannies.’ It also seemed to open the door to subdivisions and shopping centers on timberland and farms.

After three years of legal and political conflict over Measure 37, Oregon voters retreated from it by passing Measure 49, which significantly cut back on Measure 37 rights. Now that the Measure 37 experiment is over, it is possible to assess its impact and learn from its mistakes. Was it an effective guaranty of property rights, as its proponents claimed? Or was it a deregulatory nightmare that paved the way for gravel pits and massive subdivisions, as its opponents tended to believe?

Returning to the story of Dorothy English illustrates that both of those perspectives miss the point. After the county agreed to let her subdivide her property, it also insisted that “she had to comply with modern standards regarding hillside development, grading and erosion controls, road building, emergency vehicle access, and other issues.” Attempting to comply with the standards would “cause delays, cost English money and expose her to appeals from neighbors.” English and her attorney argued that under Measure 37, she did not have to comply with these standards, because they were enacted after she acquired the property. Though a judge agreed with this argument, the case was on appeal when Measure 49 was passed, potentially vitiating English’s Measure 37 claim. English was left with bitter disappointment: “Nothing, not a thing,” she says now. “I haven’t got anything, period. And I’m furious.”

Fittingly, Dorothy English’s experience is indicative of what happened with Measure 37 claims more broadly. The kind of legal uncertainty that impeded her attempt to develop her land ensnared many others, and deterred many more from even attempting to develop their land. The surprising result—which has become common knowledge in Oregon, but has yet to make its way into the legal literature—is that three years of the allegedly radical Measure 37 produced virtually no compensation and very little development. Even if in some respects Measure 37 was a success, it failed to create an effective system of compensation for regulatory takings.

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14. Id.
15. Margaret H. Cline, Government Hardly Could Go On: Oregon’s Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation, 38 URB. L. 275, 276 (2006) (asserting that “Measure 37 threatens to void the state’s entire land use planning system”).
17. Blumm & Grafe, supra note 2, at 366.
23. See infra Part II.B.
26. Id.
27. Id.
28. Id.
29. Id. In 2008, English died at the age of 95, without having received any relief.
30. Eric Mortenson, County Must Pay $1.15 Million to Dorothy English Estate, The Oregonian, Apr. 17, 2009, at B2. Litigation over her claims is still ongoing. The Oregon Court of Appeals has recently ruled in favor of her estate, ordering Multnomah County to pay $1.15 million. Id. This ruling, however, will probably be appealed. Id.
31. See infra Part II.
32. For example, it arguably jolted Oregon out of its land use torpor and forced the government to consider compromise and reform. See infra Part III.B.
It is important to learn from this failure. Measure 37 is likely to serve as a model for other states, in the 2006 election, similar initiatives were on the ballot in four states and passed in one state (Arizona). There is reason to believe that these efforts will continue. Property rights advocates in other states look up to Measure 37’s backers; it is crucial that they learn from Measure 37’s mistakes as well as from its successes. The experience of Measure 37 is relevant to the broader debate over regulatory takings and direct democracy as well. Oregon’s struggles with implementing Measure 37 demonstrate how difficult it is to create a regulatory takings regime from scratch, especially via initiative.

This Article is devoted to the question of what went wrong in the administration of Measure 37. The central argument is that the difficulties with implementing Measure 37 stemmed from two main sources. The first was that the Measure was insufficiently thought out and poorly drafted. It failed to clearly address some of the most fundamental questions concerning the regime it was setting up, from whether Measure 37 waivers were transferable, to which government entity was responsible for waiving the regulations or paying compensation, to how compensation was to be calculated.

The second problem was the frequently hostile attitude that Oregon’s state and local officials—and its judiciary—adopted toward Measure 37. Its very existence was repeatedly put in doubt either through court challenge or through threats of reform. In addition, its ambiguities were generally construed to give the Measure the narrowest reading possible. This compounded the difficulties created by the Measure’s drafting and created a pervasive climate of uncertainty with respect to what rights were secured by the Measure. This uncertainty was ultimately responsible for the limited amount of development that resulted from the Measure.

The Article will proceed as follows. Part I will provide some brief background on land use planning in Oregon. It will illustrate the unusually centralized and stringent nature of Oregon’s land use system and describe the series of attempted revolts against it which culminated in Measure 37. It will then describe Measure 37 itself and also delve briefly into the policy debate over Measure 37, rejecting the argument that Measure 37 lacks a plausible public policy justification and can only be understood in terms of a radical libertarian ideology. In fact, the benefits of forcing government entities to internalize the costs of their actions provide at least a plausible policy rationale for programs like Measure 37.

Part II will begin by documenting the fact that Measure 37 resulted in very little development. It will then explore the causes of Measure 37’s limited impact. First, it will discuss the threats to the Measure’s existence, including its temporary invalidation by Oregon courts and the constant threats to it from the political branches (which culminated in Measure 49). Next, it will discuss the many uncertainties about which rights were protected by the Measure and demonstrate that these uncertainties resulted from a combination of poor drafting and hostile interpretation by officials and courts.

Part III will systematize the lessons we should derive from Oregon’s experience. It will describe what it would take for a regulatory takings regime to be effective and ask whether such a regime can be put in place by initiative. The Measure 37 experience illustrates that it may well be very difficult—though not necessarily impossible—for an initiative process to set up a regulatory takings regime that is sufficiently well-crafted and thought-out to avoid the pitfalls of uncertainty and interference from hostile elites. It also illustrates, however, that it is possible for a regulatory takings initiative to succeed in another way—by confronting the government with the wishes of the people and forcing it to adopt the initiative’s goals, though perhaps in a more muted form. This Part will also examine the way these lessons have played out with respect to two subsequent measures: Oregon’s Measure 49 and Arizona’s Proposition 207.

Although Measure 49 was intended to curtail Measure 37, it seems likely to provide more real relief for landowners. While the scope of its protections is significantly narrower, it is much better drafted than Measure 37 and it appears to represent a real commitment to compensation on the part of the Oregon establishment. Forcing Oregon’s elites to rally behind Measure 49 may be Measure 37’s greatest success.

Proposition 207 shares Measure 37’s ambitions but also its faults. Aside from a few improvements, it is just as vague and badly drafted as Measure 37 was. Thus, it is no surprise that in its first few months, it has created more confusion and paralysis than meaningful relief for property owners. The Proposition 207 experience illustrates the important point that simply following the pattern set out by Measure 37, which so far has been the preferred approach of property rights advocates in other states, is not a good way of setting up a functional regulatory takings regime.

In short, both of these subsequent measures bring into sharper relief the lessons that should be drawn from Measure 37. Together, these three initiatives have much to teach anyone who seeks to create a functioning regulatory takings regime.

I. The Road to Measure 37

Measure 37 must be considered against the background of Oregon’s unusual land use planning system. This Part will

33. Blumm & Grafe, supra note 2, at 367 (noting that “Measure 37’s readjustment of property rights will surely serve as a laboratory for other jurisdictions”); Sullivan, supra note 16, at 132.
35. See Nancy Kubasek, From the Environment, 35 REAL EST. L. J. 611, 613 (2007) (“[T]he proponents of these bills will not be easily discouraged, especially in light of the fact that they did have one success, and at least one very close failure, so we may anticipate seeing many of these measures back on the ballots in many states in future elections.”); id. at 626-27.
37. See infra Part II.B.
38. See infra Part I.A.
39. See infra Part II.B.
40. My short description of this complicated system is heavily indebted to the helpful discussions of it in Blumm & Grafe, supra note 2, Sullivan, supra note 16, and David J. Hunnicutt, Symposium Essay, Oregon Land-Use Regulation and Ballot Measure 37: Newton’s Third Law at Work, 36 ENVTL. L. 25 (2006).
briefly explain the Oregon system, consider the history of attempted revolts against it, describe Measure 37, and say a few words about the policy debate over Measure 37.

A. The Oregon Land Use System

For several decades, Oregon has “pursued statewide land use planning on a scale not witnessed in any other American state.”41 This approach has been praised by many, but it has also been consistently criticized, especially for overemphasizing resource preservation at the expense of economic development.42

The foundations for Oregon’s current system were laid in 1973, when a supporter of the system calls “a magical year.”43 The key piece of legislation was Senate Bill 100,44 which “encapsulated[d] the spirit of reform” that was being felt in Oregon at that time.45 Senate Bill 100 created the Land Conservation and Development Commission (LCDC), gave it a central role in the statewide land use program,46 and delegated a tremendous amount of power to it.47 LCDC was given the “authority to create goals affecting all private land in Oregon, and the duty to require that all cities and counties comply with those goals.”48 In one fell swoop, final authority over zoning and planning was taken from local governments and handed over “to an unelected commission of political appointees of the Oregon governor.”49

LCDC operates by establishing “goals” and expounding on those goals through administrative regulations.50 It also supervises the planning work of the Department of Conservation and Land Development (LCDD).51 In 1979, the legislature created the Land Use Board of Appeals (LUBA) and gave it exclusive jurisdiction “to review most local and some state land use decisions for conformity with the statewide planning goals.”52

LCDC ultimately came up with 19 goals.53 The goals responsible for the most Measure 37 claims are Goal 3, having to do with agricultural land, and Goal 4, having to do with forest land.54 Goals 3 and 4 are quite broad. Ninety percent of privately held rural land in Oregon is restricted to farm or forest use.55 The numbers are “staggering.”56 Of the 61,600,000 acres of land in Oregon, only 27,600,000 are privately owned. Of that number, “24,800,000 acres (an area larger than the total acreage of New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and New Jersey combined) are zoned for farm and forest uses, 1,000,000 acres are in rural zones other than farm and forest use, and 1,800,000 acres are in urban areas.”57 In classifying land as forest or farm land, LCDC does not consider the size of the parcel, or its ability to produce harvestable timber or income from agricultural activities.58

Restrictions on the uses of farm and forest land are severe. In particular, it can be very difficult to site single-family dwellings on those lands.59 These restrictions are made even harsher by a state statute that imposes a minimum parcel size of 80 acres on forest land and farm land not designated as rangeland, and 160 acres on farm land designated as rangeland.60 The bottom line is stark: “In most cases, rural Oregonians can no longer do anything with their land except farm it or use it for timber production, regardless of market forces, their personal desire or capability to do so, or whether either use made any economic sense.”61

B. The Revolts Against the System

Because the governor and a majority of the legislature supported statewide land use planning, opposition to it took the form of citizen initiatives.62 Within 10 years of Senate Bill 100, there were three failed attempts to eliminate or radically change statewide planning via initiative.63

In the 1990s, “political stalemate within legislative and executive branches” continued to block significant reforms of the system.64 Into the breach stepped Oregonians in Action (OIA), a libertarian public interest group that sought to ease the burden of Oregon’s land use policies.65

In 2000, OIA backed Measure 7,66 which was a close analogue to what would later become Measure 37. Under Measure 7, landowners were entitled to compensation whenever a regulation enacted or enforced after they became the owners of the land lowered the value of the land. There were three exceptions to the compensation requirement, all of which would reappear in Measure 37: “historically recognized nuisance laws”; regulations that implement a requirement of federal law; and regulations “prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor.”67

41. Blumm & Grafe, supra note 2, at 281. See also Hunnicutt, supra note 40, at 28 (noting that “zoning and planning authority [is] an area traditionally reserved for local authorities”).
42. Blumm & Grafe, supra note 2, at 286 n.30.
44. 1973 Or. Laws 80 (codified as amended at Or. Rev. Stat. §197 (2005)).
46. Id.
47. Hunnicutt, supra note 40, at 27.
48. Id.
49. Id.
51. Id. at 135.
52. Id. (quotations omitted).
53. Blumm & Grafe, supra note 2, at 290.
55. Id. at 33.
56. Id.
57. Id.
58. Id. at 29.
59. Id. at 30-31.
60. Id. at 33 (citing Or. Rev. Stat. §215.780 (2005)).
61. Id. at 34.
62. Blumm & Grafe, supra note 2, at 296. See also Sullivan, supra note 16, at 137 (referring to “three attempted eviscerations of the system”).
64. Sullivan, supra note 16, at 137.
65. Blumm & Grafe, supra note 2, at 282.
67. Id.
Perhaps surprisingly, the campaign over Measure 7 “garnered little public attention or debate during the 2000 election.”68 Proponents of the Measure relied on Oregon’s “libertarian tendencies and its strong property rights culture.”69 OIA made the argument that Measure 7 would force government regulators to consider the impact on landowners before passing regulations;70 this would bring “balance and realism” to the land use system.71 OIA’s campaign “highlighted the stories of sympathetic landowners,” including Dorothy English.72 Opponents—including Oregon’s governor and two former governors—claimed that the Measure would impose massive fiscal costs and have a negative impact on the environment.73

Measure 7 passed with 53% of the vote,74 but its constitutionality was challenged in court before it could go into effect.75 The Oregon courts’ treatment of Measure 7 is worth discussing because it was a preview of the reception they would later give to Measure 37. The circuit court began by issuing a preliminary injunction, which prevented Measure 7 from going into effect.76 It then issued an opinion striking down the Measure on two state constitutional grounds.77

The first part of the court’s holding78 is that Measure 7 violates the “full text” provision of the Oregon Constitution, which requires that “[a]n initiative petition shall include the full text of the proposed law or amendment to the Constitution.”79 This is a bit of a strange conclusion, since of course the initiative petition for Measure 7 did include the full text of the proposed constitutional amendment.

The circuit court believed that this failing by itself would have been sufficient to invalidate Measure 7.80 However, the Oregon Supreme Court declined to adopt or even discuss the lower court’s full-text argument.81 Instead, it focused on the other half of the lower court’s holding, which was that Measure 7 ran afoul of the “separate votes” provision of the Oregon Constitution.82 This provision requires that each constitutional amendment submitted to the voters must be voted on separately.83

The test of whether an initiative violates the separate votes provision is whether it “would make two or more changes to the constitution that are substantive and that are not closely related.”84 The court began its analysis by showing that Measure 7 would change two separate provisions of the Oregon Constitution.

The first one is obvious. In putting in place a regulatory takings regime, Measure 7 naturally changes the Oregon Constitution’s version of the Takings Clause.85 The second affected provision is less obvious. As noted above, Measure 7 does not require compensation for a regulation “prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor.”86 According to the court, this exception affects the “free expression of opinion” clause of the Oregon Constitution,87 which has been interpreted to mean that “the state or a local government may not treat those who sell expressive material ‘more restrictively’ than those who sell other merchandise.”88

Having shown that Measure 7 makes two substantive changes to the Oregon Constitution, however, the court must still prove that the two changes are not “closely related” to each other. In this case, they do appear to be closely related. The framers of Measure 7 were worried that the broad compensation rights provided under the Measure would not be palatable to Oregonians if they forced governments to compensate strip clubs or porn shops before closing them down. The exceptions calibrate the rights in order to make them desirable to Oregonians. The relationship between the extension of rights and the exception to it is not just close, but organic—the two operate together to provide precisely the level of compensation rights intended by the Measure’s framers and endorsed by Oregonian voters.

The court devotes very little attention to this crucial issue. It simply argues that the change to the takings provision “generally expands the rights of property owners vii-à-vis the government” while the change to the free expression provision “operates to limit the rights of certain property owners, vii-à-vis other property owners.”89 But as we just saw, it is entirely possible for a restriction of rights and an expansion of rights to be closely related to each other. The court makes no effort to explain why this is not the case.

### C. The Advent of Measure 37

The invalidation of Measure 7 was a victory for the defenders of Oregon’s land use planning system, but it was “only a matter of time” before OIA came up with a successor to

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68. Sullivan, supra note 16, at 137.
69. Blumm & Grafe, supra note 2, at 302.
71. Blumm & Grafe, supra note 2, at 298 n.110.
73. Sullivan, supra note 16, at 137. See also Unofficial County Results on Measure 7 as of November 14, 2000, available at http://www.orecities.org/Portals/17/A-Z/m7/n0022.pdf. The legal challenge to Measure 7 prevented the results from being officially certified. Blumm & Grafe, supra note 2, at 302 n.122.
74. Blumm & Grafe, supra note 2, at 303.
76. Id. at 21-22.
77. Id. at 13.
78. Oregon Const. art. IV, §1(d).
79. Oregon Const. art. IV, §1(d).
80. League of Or. Cities, No. 00-C-20156, at 22.
82. Oregon Const. art. XVII, §1.
83. Oregon Const. art. XVII, §1.
84. League of Or. Cities, 56 P.3d at 904 (quoting Armanda v. Kirchaber, 959 P.2d 49, 64 (1998)). This test itself has been criticized. See Hanuccit, supra note 40, at 39 n.91 (quoting Daniel Lowenstein, Initiatives and the New Single Subject Rule, 1 ELECTION L.J. 35 (2002)).
85. League of Or. Cities, 56 P.3d at 905-06.
86. Measure 7, supra note 66.
87. Oregon Const. art. I §8 (“No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever.”).
88. League of Or. Cities, 56 P.3d at 908.
89. Id. at 910.
it that was framed as a statutory amendment to avoid the court’s holding.\textsuperscript{90} By the 2004 election, Measure 7 had been “repackaged . . . as a proposed statutory amendment” which was included on the ballot as Measure 37.\textsuperscript{91}

1. The Structure of the Measure

Although Measure 37 is slightly more complex than Measure 7, it is still quite brief. It consists of 13 subsections and runs less than 1,100 words.\textsuperscript{92} It provides that an owner of private real property is entitled to compensation when the enactment or enforcement of a new regulation—or the enforcement of an old regulation—restricts her use of the property and lowers the value of the property.

There are five exceptions to the compensation requirement: regulations “restricting or prohibiting activities commonly and historically recognized as public nuisances under common law”; regulations for the protection of public health and safety; regulations required to comply with federal law; regulations concerning the use of property for the sale of pornography or performing nude dancing; and regulations enacted prior to the acquisition of the property by the current owner or a family member of the current owner.

If a land use regulation continues to apply to a property 180 days after its owner makes a written demand for compensation, the property owner has a cause of action for compensation in the state trial courts. The property owner is also entitled to attorneys fees reasonably necessary to collect the compensation.

Instead of paying compensation, a government entity “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.” Decisions under Measure 37 are not to be considered “land use decisions” and therefore are outside of the jurisdiction of LUBA.

Payments for Measure 37 claims must be made out of funds specifically designated for the purpose. If a claim had not been paid two years after it accrues, “the owner shall not be allowed to use the property as permitted at the time the owner acquired the property.”

2. The Measure 37 Campaign

Measure 37 was well-publicized and hotly debated.\textsuperscript{93} The Measure’s supporters raised over $1.2 million, but its opponents more than doubled that in raising a “staggering” $2.75 million.\textsuperscript{94}

Many were surprised that a property rights initiative like Measure 37 could get traction in a state as committed to land use planning as Oregon.\textsuperscript{95} But it is important to remember that Oregon is “as much a libertarian state as it is a progressive state,” as evidenced by its policies on marijuana, no-fault divorce, and assisted suicide.\textsuperscript{96}

In addition, the theme of the Measure 37 campaign “was not anti-planning, but ‘fairness.’”\textsuperscript{97} The campaign focused on stories of individual landowners “whose dreams of developing their land were allegedly thwarted by seemingly extreme or arbitrary government action.”\textsuperscript{98} The radio spots featuring Dorothy English exemplified the campaign’s focus on how Oregon’s unusual land use system could have drastic consequences for individuals.\textsuperscript{99}

The opposition campaign, meanwhile, never quite settled on a simple message.\textsuperscript{100} Opponents focused on the fiscal costs the measure would impose on the state, as well as on its potentially harmful impact on farmland.\textsuperscript{101} Environmental groups alleged that Measure 37 would “generate claims on up to one-half of Oregon’s prime farmland, and would result in strip malls and big box stores sprouting from our farmland.”\textsuperscript{102}

In the end, the opposition’s message did not connect with the voters. The Measure 37 campaign was even more successful than the Measure 7 campaign\textsuperscript{103} and the measure passed with 61% of the vote, winning in 35 of Oregon’s 36 counties.\textsuperscript{104}

D. The Policy Debate

Because this Article is ultimately about why Measure 37 did not work and how similar programs might be made to work in the future, it is important to have a handle on two questions. The first question is whether there is any plausible reason to want to make a program of this sort work. The second and logically prior question is what it means to say that a program of this sort “works.”

I hope to sketch out an answer to these questions by responding to two major strands of criticism that Measure 37 has encountered. The first of these strands alleges that support for Measure 37 is an expression of a selfish, or Lochnerian, or inflexibly libertarian ideology. This line of argument, though surprisingly common, is a mischaracterization of the Measure. The second strand of criticism is that, regardless of what motivated Measure 37, there is simply no viable policy justification for a regulatory takings regime of this

\textsuperscript{90} Sullivan, supra note 16, at 138.
\textsuperscript{91} Blumm & Grafe, supra note 2, at 304.
\textsuperscript{92} Measure 37, supra note 7.
\textsuperscript{93} Hunnicutt, supra note 40, at 39. See also Blumm & Grafe, supra note 2, at 304.
\textsuperscript{94} Hunnicutt, supra note 40, at 39. The majority of the pro-Measure 37 funding came from timber and real estate interests; the anti-Measure 37 campaign got a $500,500 gift from a single winery owner and drew support from a ‘wide variety of small contributors.’ Alex Pulaski, Election 2004: Measure 37: Property Compensation: Land’s Uses, Limits at Stake, The Oregonian, Oct. 24, 2004, at D1.
\textsuperscript{95} Sullivan, supra note 10, at 5. See also Sullivan, supra note 2, at 306 (noting that the pro-Measure 37 campaign focused its argument on fairness and simplicity).
\textsuperscript{96} Blumm & Grafe, supra note 2, at 306.
\textsuperscript{97} Sullivan, supra note 40, at 40-41.
\textsuperscript{98} Blumm & Grafe, supra note 2, at 307.
\textsuperscript{99} Sullivan, supra note 40, at 39-40.
\textsuperscript{100} Sullivan, supra note 2, at 40.
\textsuperscript{101} Blumm & Grafe, supra note 2, at 304.
\textsuperscript{102} See Or. Sec’y of State, supra note 12.
sort. My response is that the benefits of forcing governments to internalize the costs of their actions can provide a plausible justification for programs like Measure 37.

I. The Ideology of Measure 37

Critics of Measure 37 routinely dismiss it by portraying it as an expression of an extreme ideology. One version of this argument is that the idea of compensation appeals only to selfish or private interests, while Oregon's statewide land use planning system represents a more enlightened and public-minded approach. An editorial in The Oregonian described the Measure 37 debate as follows: "Measure 37 has turned into a tug of war over who inherits Oregon. In the future, will it be ‘mine’ or ‘ours’?" The choice is between the “public” interest and “each individual pursuing his own private Oregon.” In a similar vein, Edward J. Sullivan complains that “[f]or too many of these people, lowering property taxes is more important than providing additional government services to their new neighbors. Autonomy in personal expenditure, a cover for self-interest, is more important than the needs of others.”

This distinction, however, does not stand up to scrutiny. Why are the demands of some landowners for greater government protection public in nature, while the demands of other landowners for greater economic development and lower property taxes are private in nature? Dorothy English’s desire to pay for her retirement by subdividing her parcel is no more selfish than her neighbor’s desire not to live next to lots smaller than 20 acres in size; her needs should be taken into account by the community as much as her neighbor’s. Oregon has stacked the deck against development to the needs of others.

Opponents of Measure 37 also frequently argue that it represents an inflexibly libertarian vision of property rights. For example, Michael C. Blumm and Erik Grafe characterize the passage of Measure 37 as “the rise of libertarian property” and lament the “subliminal libertarian message that property rights equate to development rights.” They note that “[l]ibertarians see property in static terms” and that “some even maintain that property rights are pre-political in nature.” As a coup de grace, they compare Measure 37 to Lochner v. New York, “a result now widely reviled.”

The Lochner comparison is obviously inapt, because Measure 37 is a democratically enacted rather than judicially imposed protection of property rights. But more broadly, Blumm and Grafe make surprisingly little effort to show that the libertarian principles they describe actually animated Measure 37. Indeed, it is hard to imagine that 61% of the Oregonian electorate was suddenly seized with an extreme libertarian impulse. Blumm and Grafe are right to note that supporters of Measure 37 are often imprecise about what they mean by “property rights.” They are wrong, however, to fill in the blanks with libertarian dogma that is plainly inconsistent with Measure 37.

One way to see this is to consider the Measure itself. If the concept behind Measure 37 is that development rights are “pre-political” in nature, why would Measure 37 provide no compensation for regulations that were enacted before the landowner acquired the property? Clearly, the Measure is not aimed at providing everyone with some bundle of pre-political or “natural” development rights. Instead, it is aimed at striking a balance by giving landowners the “benefit of their bargain.”

Another way of seeing this point is to focus on what Measure 37’s supporters have actually said. As Blumm and Grafe themselves note, OIA initially argued for Measure 7 by suggesting that it would bring “balance to the system by forcing regulators to consider the impacts on property owners of imposing restrictions on the use of property before doing so.” A report by the libertarian Reason Foundation sounds the same theme when it notes 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.” Instead, the purpose of the measure is to provide “a better balance between private and public interests by ensuring that state and local governments adequately weigh the costs and benefits of public action.” As an opponent of the Measure has noted, the...

106. Id. Along the same lines, Keith Aoki has asserted that Measure 37 “poses a deep conflict between government—all government—and private property rights.” Keith Aoki, All the King’s Horses and All the King’s Men: Hardest of Putting the Fragmented Metropolis Back Together Again! Statewide Land Use Planning, Portland Metro, and Oregon’s Measure 37, 21 J.L. & Pol’y 397, 436 (2005). Interestingly, Aoki acknowledges just a page earlier that “[s]upporters of Measure 37 were highly successful in portraying the state’s land use system as an unfair one-size-fits-all bureaucrac[y] run amok.” Id. at 435. It is not clear why Aoki thinks that some fundamental conflict between the government and property rights—and not the unfairness and bureaucratic overreach that were the main theme of the campaign—is the real animating idea of Measure 37.
109. Blumm & Grafe, supra note 2, at 282. See also O’Glasser, supra note 108, at 610 (calling Measure 37 “absurdly libertarian”).
110. Blumm & Grafe, supra note 2, at 283.
111. Id.
112. Id. at 284. See also Keith H. Hirokawa, Property Pieces in Compensation Statutes: Lax’s Eulogy for Oregon’s Measure 37, 38 Env’tl. L. 1111, 1117 (2008) (discussing Measure 37’s “property absolutism”); Jeffrey L. Sparks, Land Use Regulation in Arizona After the Private Property Rights Protection Act, 41 Ariz. L. Rev. 211, 222 (2009) (noting that the “basic assumption” of Arizona’s similar Proposition 207 is “that land use regulations deprive property owners of pre-existing property rights”).
113. 198 U.S. 45 (1905).
114. Blumm & Grafe, supra note 2, at 284.
115. Id. at 283.
117. Blumm & Grafe, supra note 2, at 302.
118. Gilroy, supra note 3, at 35.
119. Id.
theme of the Measure 37 campaign “was not anti-planning, but ‘fairness.’”

To summarize, Measure 37’s message certainly was not the message of libertarian property rights as conceived of by Blumm and Graé. In presenting the commercials featuring sympathetic elderly landowners who were deprived of the right to do almost anything with their property, the backers of Measure 37 were not arguing that these landowners were entitled to a pre-political bundle of absolute property rights. Instead, they were arguing that these landowners had been treated unfairly by the Oregon land use system; that this system was out of balance and needed to be readjusted; and that governments would make better decisions if they had to consider the impact of the regulations they imposed. That—and not the rigid libertarian theory—was the argument the people of Oregon endorsed by passing Measure 37.

Blumm and Graé are right, however, to note that the policy argument behind Measure 37 was rarely fleshed out rigorously or in much detail. The next part will briefly illustrate what such an argument might look like.

2. Measure 37 and Cost-Internalization

Hannah Jacobs has argued that initiatives like Measure 37 are too drastic, primarily because they make zoning too difficult. But this critique begs the question of whether the additional zoning that would occur without the compensation regime would be beneficial or harmful. And as Jacobs herself acknowledges, many scholars believe that forcing the government to compensate landowners for the cost imposed by regulations actually improves government decisionmaking. The concept underlying this theory is “fiscal illusion” — the idea that regulation can be “too cheap” from the perspective of the government because the government is not forced to bear its costs. Under a compensation regime, the theory goes, governments would avoid unnecessary and harmful regulations while enacting the regulations that are genuinely beneficial.

The typical response to this argument is that government entities are not profit-maximizing firms, and therefore there is no reason to believe that requiring governments to internalize costs will lead to efficient outcomes. But this response has been plausibly rebutted in at least two ways. First, Prof. Christopher Serkin has convincingly argued that with respect to local governments, which are the primary source of land use regulations, there is good reason to expect that cost-internalization will create efficient regulatory incentives. This is because local governments are relatively majoritarian, and dominated by homeowners who reap the benefits of regulation through increased property values. These same homeowners would pay for compensation through property taxes. The political and economic costs of regulation are, therefore, aligned.

Even where land use law is made not by local governments, but by a state agency like the LCDC, there are reasons to believe that cost-internalization can improve its decisionmaking. As Prof. Jonathan Adler argues, the correct question is not whether a regime will produce perfectly efficient decisions; the question is whether “a specific reform will move policy in a preferable direction at the margin.” Regulators do not have perfect information, and a compensation requirement provides them with valuable insight into the “prices” of different regulatory strategies. Furthermore, regulatory agencies have fixed budgets, and a compensation requirement will force them to consider trade-offs in allocating its resources. There is, therefore, at least a plausible case that initiatives like Measure 37 could have a strongly positive effect by forcing governments to consider the impact of their actions and eliminating inefficient regulation.

The aim of this section is not, of course, to demonstrate conclusively that Serkin and Adler are correct, or that Measure 37 fits their models perfectly. The point, rather, is that there is a plausible normative justification for regulatory takings initiatives that does not require a commitment to a thoroughgoing libertarian vision of property. This justification implies a particular vision of what a well-functioning regulatory regime would look like. In order for cost-internalization to work, governments must have a feasible and accurate method of assessing the amount of compensation they would have to pay, which would allow them to make informed decisions about whether or not a particular regulation is worth

120. Sullivan, supra note 10, at 5. None of this is to deny, of course, that some supporters of regulatory takings initiatives may be motivated simply by a dislike of planning and regulation. See Carol M. Rose, Constitutional “Niches”: The Role of Institutional Context in Constitutional Law: What Federalism Tells Us About Taking Jurisprudence, 54 UCLA L. Rev. 1681, 1697 (2007) (noting that Howard Rich, a wealthy backer of takings initiatives, has admitted that his goal is to impede regulation).


122. Id. at 1539.


124. Id. at 38.


126. Id. at 1628-29. I am, of course, significantly oversimplifying Serkin’s argument. In particular, he identifies two significant caveats to the simple cost-internalization story, namely the local governments’ risk aversion and the existence of externalities. Id. at 1665. The point of my brief discussion, however, is merely to identify the basic mechanism by which regimes like Measure 37 might make government decisionmaking more efficient.

127. Adler, supra note 123, at 38.

128. Id. at 39.

129. Id. at 40.

130. Arguably, the cost-internalization rationale for Measure 37 is also well-aligned with the fairness-centered rhetoric of Measure 37’s supporters. The goal of fairness to individual landowners is a natural fit with cost-internalization. As three authors sympathetic to Measure 37 point out, allowing society to impose the burden of regulation on individual landowners both unfairly singles out those landowners and hides the true costs of the policy. Steven Georgiey Gieseler et al., Measure 37: Paying People for What We Take, 36 ENVTL. L. 79, 83 (2006). Such a policy can be viewed as unfair because it undervalues the interests of the landowner, forcing her to bear a greater burden so that society can reap a lesser benefit. This is at least one way of understanding why Oregonians were upset about what happened to Dorothy English—she was forced to bear a significant burden without much corresponding benefit to society. This is precisely what cost-internalization guards against.
the cost. A compensation regime also needs to be predictable and stable, so landowners can know when filing a claim is worth it and local governments can know which claims are legitimate. As we will see, Measure 37 failed on both counts.

**II. Implementing Measure 37**

This Part will consider Oregon’s experience with Measure 37. It will begin by documenting the surprisingly limited impact of the Measure. It will then explore two major reasons for that limited impact. First, there was consistent uncertainty about whether Measure 37 would continue to exist. Second, there was even greater uncertainty about the scope of the rights provided by the Measure. The confluence of these factors prevented many landowners from turning their Measure 37 claims into actual development, and deterred many more from even making the attempt. This Part will also demonstrate that the two major reasons for the uncertainty surrounding Measure 37 were the Measure’s subpar drafting and the hostility with which it was often treated by state officials, local officials, and the Oregon judiciary.

**A. The Impact of the Measure**

The most commonly cited statistic about Measure 37—the thousands of claims for billions of dollars that it produced—certainly makes it seem that Measure 37 had a significant impact on land use patterns in Oregon. Though this is an easily available statistic, it is also a misleading one; the number of claims is not an especially useful indicator of Measure 37’s actual impact.

One reason for this is that landowners were routinely advised to reserve their Measure 37 rights by making a claim even if they had no actual plans of developing their land. Many landowners had strong reasons not to develop their land to the full extent of their Measure 37 rights, or at all. In some cases, the problem was the absence of a market: some claims were in remote areas where there was no demand for development. In other cases, the problem was infrastructure. A third reason to forgo development was to avoid tensions with the neighbors; Measure 37 claims occasionally caused bitter conflict. In addition to all this, of course, there were significant legal obstacles to development that will be described elsewhere in this Part.

For all of these reasons, the number of claims is not a reliable indicator of Measure 37’s actual impact (though of course some have tried to use it as such). To get a better idea of Measure 37’s effect, we will have to answer two questions, tracking the two options Measure 37 gives to governments. First, how often were landowners compensated? Second, in cases where the government entity chose to waive the regulation, how often were landowners able to take advantage of the waiver?

The answer to the first question is simple: there was virtually no compensation. In the entire history of Measure 37, there is only one instance of a government paying compensation to a claimant. In that case, landowners Grover and Edith Palin wanted to develop their land, which happened to be located on the rimrock that was viewed as the “singularity” and “the striking feature” of a town called Prineville. The city ultimately paid the Palins $180,000 not to develop their land. The process of arriving at that number was apparently something of a comedy of errors, illustrating the administrative difficulties Measure 37 encountered. For example, the city’s initial offer of $47,750 was based on an appraisal by a city-appointed appraiser who “admitted he was likely on the wrong piece of property when he made his evaluation.”

Prineville’s decision to compensate the Palins was the exception that proved the rule. As a general matter, both state agencies and local governments simply had no money designated to pay compensation, so they responded to Measure 37 claims they deemed meritorious by waiving the relevant regulations with respect to the claimant’s property.

131. See supra note 7 and accompanying text.
132. Eric Mortenson, Measure 49 Study Finds Big Catchback, The Oregonian, Oct. 17, 2007, at A1 (OIA president noting that “attorneys advised many property owners to file huge subdivision claims only as ‘placeholders’ to preserve future development rights”).
133. Eric Mortenson, Land Use: Did Voters Overdo It or Get It Right?, The Oregonian, Sept. 23, 2007, at A1 (quoting the director of the Institute of Portland Metropolitan Studies on this point).
134. Tyler Graf, Developers Divide on Oregon’s Measure 49, Daily J. Com. (Portland, Or.), Oct. 11, 2007 (developer arguing that big-box stores and housing developments might be stalled by “water, sewer and road concerns”). See also Interview with Eric Mortenson, supra note 96 (noting that one of the two schools of thought on Measure 37 is that it would not have much of an impact, in part because of infrastructure concerns).
135. See Eric Mortenson, Claim Sours Friendships on Chehalem Mountain, The Oregonian, May 31, 2007, at 10 (stating that “relationships of more than 30 years have splintered over [a Measure 37] claim”); Laura Oppenheimer, At Timber Companies Stake Out Prime Oregon Land for Development, Activists Are Getting Out Their Checkbooks to Try to Preserve It, The Oregonian, Dec. 26, 2006, at A1 (noting timber companies’ concern about local resistance to development); Oppenheimer supra note 37 (describing neighbors teaming up to fight a Measure 37 claim).
136. See, e.g., Mortenson, supra note 132 (OIA president noting that health and safety regulations would limit development).
137. For example, Clackamas County sent out 182,000 copies of a map showing all of the claims that had been submitted to it, and many county residents were shocked at the number of claims. Peter Zuckerman, Measure 37 Maps Elicits Shock Around County, The Oregonian, May 17, 2007, at 11. Given the extent to which the number of claims overstated the actual extent of Measure 37 development, this effort was probably more misleading than informative. Similarly, a study attempted to gauge the impact of replacing Measure 37 with Measure 49 by considering a large number of claims and how they would be handled differently under the two regimes. Mortenson, supra note 132. For an example of a scholarly work citing the number of claims as support for the proposition that Measure 37 is “likely to have a dramatic effect on land use across the state,” see Puskas, supra note 8, at 1308.
138. News Q&A, The Oregonian, Nov. 18, 2007, at A2 (noting that it is believed that only one claim has been compensated). See also E-mail from Sheila Martin, Dir., Inst. of Portland Metro. Studies, Portland State Univ., to author (Mar. 23, 2007) (on file with author) (noting that only one payment had been proposed).
140. Id.
141. Palin’s [sic] Withdraws Refile M37 Claim, Cent. Oregonian, Dec. 1, 2006. This led to Grover Palin appearing before the city council to declare that “[y]ou seven people did a lot of things wrong.” Id.
142. Sullivan, supra note 16, at 143. See also E-mail from Bob Rindy, Policy & Legislativ Liaison, Or. Dept. of Land Conservation & Dev., to author (Mar. 23, 2007) (on file with author) (noting that there is no fund to compensate landowners and little hope of finding such funding in the future); Interview with Jennifer Hughes, Measure 37 Program Manager, Clackamas County (Aug. 14, 2007) (stating that there was no discussion of compensating Measure 37 claimants in Clackamas County) (on file with author).
The notion that waivers themselves did not amount to development was not always understood. See, e.g., Puskas, supra note 8, at 1303 (“Many . . . Oregonians . . . are disturbed by the dramatic change in the state’s landscape threatened by Measure 37 waivers.”).


47. Measure 37 Claims Spreadsheet, Clackamas County (on file with author).

48. Id. See also Erickson Claim file; Interview with Jennifer Hughes, supra note 44; for partitions, and about a dozen requests for houses. subdivision applications (the biggest one requesting 41 lots), 15-20 requests for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for commercial or industrial development, only four applications for 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might ultimately be reinstated would still face all the uncertainties of Measure 37.

All in all, “little . . . indicates a wave of development.”167 As one county’s planning director put it: “My sense is that there are very few nails being pounded.”168 A former director of the DCLD, who presided over most of the implementation of Measure 37, summarized the situation as follows: “[o]f the thousands of waivers granted, barely a handful are moving forward with any kind of development—and most of those are proceeding uncertainly.”169

It seems safe to say, then, that contrary to the fears of its opponents and the hopes of its supporters, Measure 37 did not lead to a significant amount of development in the three years it was in force. This should be a troubling result for property rights advocates seeking to emulate Measure 37 in other states. What seemed to be a stunning electoral success has not translated into any appreciable benefits for the vast majority of the landowners whose “benefit of the bargain” Measure 37 sought to secure. The rest of this Part will be devoted to exploring some of the reasons why Measure 37 resulted in so little direct change.

B. The Threats to the Measure

The first major reason for Measure 37’s limited impact is that throughout its existence, its future was in doubt. The threats to the continued operation of Measure 37 came both from the courts and from the political branches.

I. The Legal Challenge

Measure 37 was quickly challenged in court by a group of plaintiffs including 1000 Friends of Oregon, a prominent pro-planning group.170 The opponents of Measure 37 made this facial challenge an important component of their attempt to minimize the effects of the Measure.171 Circuit Court Judge Mary James rewarded their efforts and held the Measure unconstitutional on several theories.172 This ruling caused outrage among the supporters of the Measure, leading to accusations that the judge was politically motivated173 and even a recall campaign against her.174 In some quarters, Judge James has become the symbol of anti-Measure 37 judicial activism.175 To see how far-fetched Judge James’ theories were, it will be helpful to contrast her circuit court opinion with the unanimous Oregon Supreme Court opinion overturning it.176

The first ground upon which the circuit court invalidated Measure 37 is that it supposedly interfered with the legislature’s plenary power to legislate.177 This is because Measure 37 requires government to pay in order to enforce regulations; in other words, the government “must pay to govern.”178 But as the Supreme Court opinion pointed out, this argument is confused at a very basic level. Measure 37 is “an exercise of the plenary power, not a limitation on it.”179 It merely imposes certain requirements on public bodies; it does not purport to divest the legislature of the power to change those requirements in the future.180

The circuit court also found that Measure 37 violated the Equal Privileges and Immunities Clause of the Oregon Constitution.181 The court begins by arguing that, with respect to any given land use regulation, Measure 37 divides landowners into pre-owners and post-owners, two classes which are treated differently.182 These are “true” classes because the distinction between pre- and post-owners would exist independently of Measure 37, and because there is no way for post-owners to bring themselves within the favored class.183 The court further argues that this distinction fails the rational basis test.184 This is so, first of all, because the valuation method used by Measure 37 does not accurately capture the diminution in value of the property.185 In addition, the law irrationally benefits those pre-owners who have owned the land longer than more recent pre-owners, because they most likely bought the land more cheaply and would thus receive a greater windfall.186 The state’s proffered rational basis that “post-owners took their property knowing of the limitations of use on the property and therefore the cost of

167. Mortenson, supra note 133. See also Catherine Trevison & Gosia Wozniacka, Billboards: Pit Beauty vs. Business, The Oregonian, Aug. 12, 2007, at A1 (noting that while there had been 54 Measure 37 claims to build billboards in the Portland area, so far only three had been built); Interview with Eric Mortenson, supra note 96 (noting that commercial development under Measure 37 had been limited to a couple of billboards).

168. Mortenson, supra note 133.


170. Blumm & Grafe, supra note 2, at 311.


173. Blumm & Grafe, supra note 1, 311.


175. See, e.g., Libby Tucker, Metro Confronting Measure 37 Land Use Claims, Daily J. Com. (Portland, Or.), July 13, 2006 (attorney describing a novel valuation method as follows: “This is another one of those Hail Mary pass type of ideas. Metro’s going to throw anything out there and hope they get with a Judge James.”). See also David Reinhard, Op-Ed, The Rule of Law Triumphs Over Rule of Judge James, The Oregonian, Feb. 23, 2006, at B6 (attacking James for judicial activism).

176. MacPherson v. Dep’t of Admin. Servs., 130 P.3d 308 (Or. 2006). Blumm and Grafe dismiss the Supreme Court opinion as “surprisingly unreflective.” Blumm & Grafe, supra note 2, at 314. In my view, it is the circuit court opinion that is surprisingly unreflective. For another critical evaluation of Judge James’ opinion, see O’Glasser, supra note 108, at 611.


178. Id. at 11.

179. MacPherson, 130 P.3d at 315.

180. Id.

181. Or. Const. art. I, §20 (“No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”). Blumm and Grafe, apparently approvingly, suggest that this argument was “the most interesting aspect of the circuit court’s decision.” Blumm & Grafe, supra note 2, at 312-13.

182. MacPherson, No. 05C10444, at 10.

183. Id.

184. Id. at 13-14.

185. Id. at 14.

186. Id.
moving forward and ambiguities from being worked out. The delay was extremely harmful to some claimants. One 78-year-old claimant died while the Supreme Court was considering the constitutionality of the Measure. Given that many of the claimants were “in their mid- to late-80s and had precarious health,” this was hardly an unusual occurrence; in fact, an attorney handling a number of Measure 37 claims routinely discussed the possibility of death with his clients.

In addition to all this, the decision introduced even more confusion. The lower court’s order enjoining the processing of Measure 37 claims was not binding on all public entities, but only on the state and four counties. The practical effect of this was to freeze most claims, since it was thought that most claims had to go through both the state and the local government. The formal effect on nonparticipating entities was less clear. For example, would the 180-day time limit for processing claims continue to run while the Measure was being evaluated by the Supreme Court? The effect of the invalidation on the deadlines for claimants was similarly unclear. A Clackamas County planner answered a landowner’s question on the subject as follows: “That is an interesting question, to which I don’t have an answer.”

In sum, a single judge had a profoundly negative impact on the development of Measure 37, in a way that the framers of the Measure could not have done anything to prevent.

2. The Political Challenge

The 2005 legislative session featured a number of proposed bills that would have altered Measure 37. Several of these bills would have changed the operation of Measure 37 quite radically, for example by “allowing local governments to deny a Measure 37 claim where the value lost by the claimant due to the application of a land use rule is less than the value that would be lost by neighbors if that land use rule was waived with respect to the claimant” or by “providing only prospective, but not retrospective, relief to property owners.”

The most significant of these bills was Senate Bill 1037. It moved Measure 37 in a more conservationist direction, “precluding all claims on high value farmland, barring most claims within urban growth boundaries.” It also estab-
lished a more stringent valuation process, clarified which government entity could waive claims, and explicitly made Measure 37 waivers transferable. The transferability provision proved unpalatable to Democrats, causing the bill to fail in the Senate.

Ultimately, the 2005 legislative session produced no reform of Measure 37. The MacPherson case was still working its way through the courts when the session ended, perhaps, the lack of urgency among the legislators could be explained in part by the fact that both sides hoped that a legal victory would vindicate their position. Still, the session made clear that serious changes to Measure 37 would remain prominent on the legislative agenda, and that it would be foolhardy to rely on Measure 37 continuing to operate in its original form indefinitely.

The calls for a Measure 37 “compromise” continued in the run-up to the 2007 legislative session. The legislature formed a special committee in an attempt to forge a compromise. The governor called for a “Measure 37 timeout,” which would prioritize claims seeking to build a single house on rural land, and freeze all the remaining claims until the end of the legislative session. Tellingly, at least some Measure 37 claimants thought the timeout was just a “stalling tactic” in preparation for eliminating Measure 37 entirely. Claimants who had already invested significant time and money into their Measure 37 claims vigorously opposed the plan.

One source of pressure for a legislative solution came from the flood of claims that arrived in December of 2006. Measure 37 had gone into effect in December of 2004, and claims based on pre-Measure 37 regulations had to be filed within two years if they were to avoid LUBA review. This resulted in a rush of claims, with the total number of claims statewide doubling within three weeks.

Overwhelmed local governments faced the prospect of dealing with thousands of new claims with a 180-day deadline. Some counties significantly streamlined their procedures in order to be able to process the claims in time. The Oregonian called on the legislature to extend the deadline.

The 2007 legislature, with both houses now controlled by the Democrats, obliged, and extended the time limit to 540 days for claims filed after November 1. While this extension surely provided a welcome relief to many local governments, it also allowed those governments that were hostile to Measure 37 to significantly postpone processing claims. For example, Multnomah County, which had been unusually hostile to Measure 37 throughout, used the extension to suspend consideration of claims. Similarly, Washington County used the extension to postpone consideration of the most contentious Measure 37 claims until after the November election, a decision which one of the county commissioners regarded as “artificially juggling” the claims. The extension diluted the rights of claimants who would otherwise have the right to have their claims processed in a prompt manner; it also showed that Measure 37 rules could change in the middle of the game.

The other major decision made by the 2007 legislature with respect to Measure 37 had an even greater disruptive impact on Measure 37 claims. In June, the legislature “referred to the state’s voters—through Ballot Measure 49—a 21-page comprehensive revision of Measure 37.” The reason Measure 49 was referred to the voters instead of simply being passed by the legislature is that not all of the House Democrats were willing to sign on to an outright legislative modification of Measure 37. Reportedly, a single Democratic representative refused to go along, based on the fact that his own district had voted overwhelmingly for Measure 37.

Measure 49 was a proposal that would radically overhaul Measure 37. First, it would prohibit all commercial and

212. Id.
213. Id.
214. Id.
215. Blumm & Grafe, supra note 2, at 318.
217. Id.
218. Ed Sullivan, Betting the State: The Politics of Measure 37 Endure, DAILY J. COM. (Portland, Or.), May 10, 2007 (noting that Measure 37 was not addressed by the 2007 legislature “in part because of each side’s supreme confidence it would prevail in the pending challenge to the measure working its way through the courts”).
221. Peter Wong, Measure 37 Timeline Meets With Praise, Criticism, STATESMAN J. (Salem, Or.), Feb. 9, 2007, at 1.
222. Id. (quoting a claimant).
224. Dawn Dutton said she has devoted two years to “the meetings, the paperwork, the checks, the fees” to file a claim and go through Clackamas County’s development process. She said she spent $40,000 extra for utilities and roads for a trio of homes, which would be wasted if she could build only the one that’s already under construction. “These are the lives of real people they are contemplating jerking around,” Dutton said.
225. Id.
229. Sullivan, supra note 218.
230. Blumm & Grafe, supra note 2, at 360. See also Governor Signs Land-Use Claims Extension, STATESMAN J. (Salem, Or.), May 11, 2007, at 3.
231. Sullivan, supra note 218.
234. Blumm & Grafe, supra note 2, at 360 & n.464. See also Peter Wong, Measure 37 Rewrite Will Go to Voters, STATESMAN J. (Salem, Or.), June 20, 2007, at 6.
236. Sullivan, supra note 218. See also Parker, supra note 148, at B1.
237. Blumm & Grafe, supra note 2, at 361-65.
industrial claims, leaving only residential claims. Second, for regulations enacted prior to January 1, 2007, it limited claims on high-value agricultural or forest land, and groundwater-restricted land, to three dwellings. While claims on other types of land could request up to 10 dwellings, this would require a showing of reduction of value that was viewed as so difficult that it was not expected to be frequently used. 238 Requesting up to three dwellings, meanwhile, would put claimants in an express lane, 239 where no showing of loss of value needed to be made.

For claims arising from regulations enacted after January 1, 2007, Measure 49 allowed up to a total of 20 dwellings per landowner across all claims. However, claimants would have to show loss in accordance with the Measure’s stringent formula and any waiver would have to be proportional to their demonstrated loss. Measure 49 also narrowed Measure 37’s exclusions for federal laws and laws relating to health or safety and clarified which governments were entitled to waive regulations and what counted as a “land use regulation.” Importantly, it also explicitly provided that Measure 49 claims would be transferable. Though the fate of Measure 49 would not be decided until November, it had an immediate impact. For one thing, the only Measure 37 claims that would be allowed to proceed if Measure 49 were to pass were claims that had “vested” under the common-law definition. While it was murky what exactly that meant, there was every reason to expect that it would be a difficult requirement to meet and a real possibility that any development that took place after Measure 49 was referred to the voters would be viewed as “bad faith” and would not contribute to a claim’s vestedness. Thus, any development undertaken after the referral would involve an even greater risk. In addition, as mentioned above, the combination of the referral and the extension of the deadline for processing claims allowed certain governments to push off deliberately the consideration of at least some claims until after the vote had taken place. 242

The impact of trying to operate in conditions of such uncertainty should not be underestimated. The passage of Measure 49 put in serious question, for example, claims where the property owner had invested hundreds of thousands or even millions of dollars in the Measure 37 process. Given the costs of development and the uncertainty that Measure 37 rights would continue to exist were only part of the uncertainty surrounding the Measure; at least as important were the questions about precisely what rights Measure 37 conferred.

C. Questions About the Measure’s Scope

A number of basic questions about the scope of Measure 37 were either never resolved, or resolved in a way that severely limited Measure 37’s rights. The problem was caused by a combination of two factors: ambiguities in the language of the Measure, and the hostility of some governmental actors to the Measure.

I. The Costs of Confusion

As the former director of DLCD who presided over most of Measure 37’s implementation quipped, Measure 37 was not simple; it was simplistic. 245 Indeed, as a Clackamas County planner told me, almost every word of it gave rise to ambiguity. 246 The confusion led to over 250 lawsuits. 247 Because few cases made it to appellate courts and the vast majority of the relevant decisions were local trial court decisions that were not binding statewide, lawyers did not have many precedents to rely on. 248 As a result of the uncertainty, there was little uniformity in the handling of Measure 37 claims across the state, as different governments adopted very different approaches. 249

At least in part because of the lack of settled procedures concerning Measure 37, implementing the Measure was a serious administrative burden on state and local governments. The state allocated $6 million and 31 employees to the task of dealing with Measure 37 in its two-year budget, and one county claimed it would have to spend $2 million just to process all of the claims it received. Some county planners were devoting the majority of their time to handling Measure 37 claims. 250

239. Id.
240. See infra Part III.B.
241. Clackamas County, for example, would eventually adopt just that interpretation. Peter Zuckerman, June 16 Cut-Off Date for Land Claims, The Oregonian, Jan. 23, 2008, at B3.
242. See supra notes 231-33 and accompanying text.
245. Shetterly, supra note 169. Two years after the Measure was enacted, there were over 100 Measure 37 lawsuits to which the state was a party. Laura Oppenheimer, Two Years of Changes and Challenges, The Oregonian, Dec. 3, 2006, at A15. It is fairly clear that Gilroy was overoptimistic in dismissing the idea that Measure 37 would cause a flood of litigation as a “myth.” Gilroy, supra note 3, at 39.
246. Interview with Jennifer Hughes, supra note 142. See also Oppenheimer & Gorman, supra note 197, at A1 (Yamhill County counsel stating that “there are many issues where we have no idea what the answer is”); David J. Petersen, Op-Ed, Implementing Measure 37—Oregon Needs Some Land-Use Certainty, The Oregonian, Mar. 1, 2007, at C9 (land use lawyer arguing that legislature needs to act “to address the many uncertainties created by Measure 37”).
247. Shetterly, supra note 169.
249. Steve Mayes, Not All Measure 37 Filing Proper, The Oregonian, May 10, 2007, at 4 (describing different counties’ divergent approaches toward handling Measure 37 claims). Multnomah County, for example, required a $1,500 filing fee, refused to consider any claims that asked for a subdivision of four parcels or more, and required claimants to demonstrate lost value with an appraisal. Catherine Trevison & Gosia Wozniacka, Measure 37 Claims Heat Up, The Oregonian, Dec. 14, 2006, at 1.
250. Oppenheimer, supra note 36.
251. Gorman, supra note 233.
252. Akimoff, supra note 226 (quoting planning manager for the point that 75% of the staff effort was devoted to Measure 37); Mortenson, Uproar, supra note 132
In sum, uncertainty about the scope of Measure 37 was a significant obstacle to the implementation of the Measure. We now turn to some of the sources of this uncertainty.

2. Transferability

The absence of a clear right to transfer Measure 37 waivers is routinely cited as perhaps the biggest practical difficulty that impeded Measure 37 development.253 If the waivers were treated as transferable, then successful Measure 37 claimants would be able to sell their land to developers who would then enjoy the same development rights. If the waivers were not treated as transferable, however, the landowners would have to develop the land themselves; in addition, they might only be able to sell the developed land as a nonconforming use, limiting the buyer’s ability to make alterations to it.254

It is not surprising that transferability should emerge as a key issue. After all, “much of a waiver’s economic value inheres in the ability of a landowner to transfer the rights conferred by the waiver to a purchaser of her property.”255 Inability to transfer the land for purposes of development may lead to “chronic financing difficulties.”226 Indeed, transferability made Oregon bankers, insurers, and real estate professionals anxious about becoming involved with Measure 37 claims.257 Developers too, tended to stay away from “waive-ered” properties because of concerns about transferability.258

So what does Measure 37 say about transferability? There is no explicit textual answer. Subsection 8 states that the governmental entity “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.”259 This text seems to leave open the question of whether the modification, removal, or nonapplication of the regulation is personal to the owner or transferable. Nor does the history of Measure 37’s enactment shed much light on the transferability question. It appears that this crucial issue never came up in any of the print coverage of the Measure 37 campaign, and nor was it raised in television advertisements or in any of the arguments in favor that accompanied the Measure.260

Still, some supporters of Measure 37 thought the answer to the question was obvious. As one Measure 37 claimant told me, if you are pro-Measure 37, it “reads really easily.”261 In his view, it had always been assumed that one could sell the property after getting a waiver, until attorneys from the dominant pro-planning faction came in and complicated matters.262 Whether or not this characterization is correct, David J. Hunnicutt has made a powerful argument that under the best reading of Measure 37, transfers of waivers would be allowed.263 Hunnicutt begins his analysis with Subsection 1, which demands compensation for regulations that restrict the “use” of private property. Since “property” has been viewed by both Oregon and federal courts as encompassing a wide variety of rights—including the right of transfer—it is clear that a regulation that prohibited the sale of property would trigger the compensation requirement of Subsection 1. But there is no reason to suppose that the words “use” and “property” mean something different in Subsection 8 than they do in Subsection 1.264

In addition, common sense militates against the “no-transfer” interpretation. As Hunnicutt puts it, “[n]othing in the campaign provides that the voters intended for a property owner to regain the right to use his property in the way he could when he acquired it, but not be able to transfer those rights.”265 He might have added that providing this curtailed bundle of rights as a substitute for monetary compensation makes no sense in light of the compensatory purpose of Measure 37.266 There is no reason to believe that the right to develop the land, which may be worth vastly less without the accompanying right to sell the land to be developed by someone-else, is an adequate substitute for compensation equal to the property’s loss in fair market value.

In spite of all this, Oregon’s Attorney General and at least two circuit courts have taken the opposing position, albeit for different reasons. The Attorney General’s central argument concerns the phrase “modify, remove, or not to

253. See Blumm & Grafe, supra note 2, at 324 (calling the transferability issue “perhaps the most pressing uncertainty surrounding Measure 37 waiver provisions”); Hunnicutt, supra note 40, at 44 (noting that the relevant subsection “has proven to be the most controversial and litigated subsection of the measure”); Sullivan, supra note 16, at 146 (referring to transferability as a “key issue”); Eric Mortenson, Opponents Call 49 “A Bill of Goods,” THE OREGONIAN, Sept. 28, 2007, at B1 (quoting director of pro-conservation 1000 Friends of Oregon for the proposition that lack of transferability has blocked construction of Measure 37 claims); Laura Oppenheimer, Flood of Claims Snarls State Land Use Worries, THE OREGONIAN, Dec. 5, 2006, at A1 (”[t]he state’s interpretation prevents longtime owners from selling to professional developers, which is holding up many projects.”); Interview with Jennifer Hughes, supra note 142 (stating that transferability issues make people hesitant and impede financing); E-mail from Sheila Martin, Dir., Inst. of Portland Metro. Studies, Portland State Univ., to author (Mar. 23, 2007) (on file with author) (stating that “very little development has happened mainly because the waivers are not transferable”).


255. See Blumm & Grafe, supra note 2, at 325.

256. Id.

257. Eric Mortenson, Report Lands New Land-Use Idea, THE OREGONIAN, Sept. 25, 2007, at B1 (referring to a report that concluded that “banks are reluctant to issue construction loans based on using the land as collateral” and “[t]itle insurance companies are likewise hesitant to get involved”); Sullivan, supra note 16, at 146 (predicting that Measure 37’s vagueness will “cause those involved in real estate and development to abjure responsibility for transactions involving the Measure”); id. at 158 (“It appears that lending institutions will not finance property improvements on ‘waivered’ lands.”). See also Caroline E.K. MacLaren, Oregon at a Crossroads: Where Do We Go From Here?, 36 ENVTL. L. J. 33, 67 (2006).

258. Libby Tucker, Inverted in Urban Growth Boundaries, Oregon Builders Fight Measure 37, DAILY J. CON., Oct. 11, 2007 (developer noting that builders have avoided purchasing land approved for development under Measure 37 because of transferability-related uncertainty, and stating that “[a] developer would much rather play a set of rules they know and have confirmed expectations knowing they will be able to develop”).

259. Measure 37, supra note 7.


262. Id.

263. Hunnicutt, supra note 40, at 44-45.

264. Id.

265. Id. at 45.

266. Sullivan, supra note 248, at 614.
Another difficult issue was the scope of three of the exceptions to the compensation requirement of Measure 37: the

exception for regulations restricting public nuisances; the exception for the protection of public health and safety; and the exception for regulations required to comply with federal law.

The nuisance exception states that compensation is not required for regulations “[r]estricting or prohibiting activities commonly and historically recognized as public nuisances under common law.” The exception is to be “construed narrowly in favor of a finding of compensation under this act.”

In Sullivan’s view, this exception has little substance, as public nuisances are difficult to prove and subject to equitable defenses and the exception explicitly demands narrow construction.” But the potential of the nuisance exception to be interpreted broadly is illustrated by the analogous provision of Measure 7, which was read so broadly by the Attorney General that some thought the scope of the Measure 7 compensation requirement “might be quite limited.”

Despite the narrower wording of the Measure 37 nuisance exception, courts might still have room to interpret it broadly. They could use the fact that the phrases “common law” and “commonly and historically recognized” are somewhat ambiguous. How is one to classify, for example, public nuisances created by statute, or common-law nuisances codified by statute? This points to a real design problem for a program like Measure 37. Limiting “nuisance” to common-law nuisances defined by the courts creates a possibly artificial distinction between court-defined and statutorily defined nuisances, and limits the legislature’s ability to define new public nuisances. On the other hand, allowing an exception for statutorily defined nuisances threatens to eviscerate the compensation requirement.

Because this exception was never interpreted by the Attorney General or the courts, we will never find out what impact this exception would ultimately have had on Measure 37. But as we have seen, Measure 37’s failure to grapple with the concept of nuisance left this exception as a potential time bomb that could have significantly disrupted the Measure 37 compensation program.

The exception for regulations concerning public health and safety had more of an immediate practical impact. It exempts from the compensation requirement all regulations “[r]estricting or prohibiting activities for the protection of public health and safety.” Although the exclusion of

3. Exceptions

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apply.” Modifying or removing, the argument goes, could mean either that the regulation no longer applies at all, or that it no longer applies to the property while it is owned by the current owner. Not applying the law, however, must mean that the government simply refrains from enforcing the law against the current owner, and must enforce it again as soon as the property is conveyed. This argument strikes me as entirely question-begging; it is quite possible not to apply the regulation to the next owner, as well. If anything, this form of argument would point in precisely the opposite direction, since “modify” and “not to apply” seem consistent with either the personal or the transferable conception of waivers, but removing the regulation has a connotation of finality which suggests that the regulation should not just spring back to life as soon as the property is transferred.

The Crook County Circuit Court also decided that waivers were not transferable. The court’s argument is that Measure 37 only authorizes a waiver to allow the owner to use the property for a use permitted when she acquired it. There is no authorization for the owner “to transfer all interest in the property and preserve for the new owner the right to use the property under the waiver.” But the court never confronts the possibility that transferring the property is, as the Hunnicutt argument suggests, a use of the property. The other court to address this question is the Jackson County Circuit Court. This court did not focus on the phrase “modify, remove, or not to apply,” or on the word “use.” Instead, it focused on the word “owner.” Since the relief is due to the present owner, the argument went, it cannot also be granted to subsequent owners. This argument ignores the question of what relief is due to the present owner; this relief could easily include the right to sell the property to others.

As we have seen, the problem of transferability, which was perhaps the most serious practical problem faced by Measure 37, is also a perfect illustration of why Measure 37 ran into trouble more generally. The initial problem was caused by the Measure itself, which failed to explicitly address an important issue. After that, however, three authoritative interpreters found three different ways of arriving at an implausibly narrow reading of the Measure. This instance of vague drafting exacerbated by unfriendly interpretation is, in some ways, the Measure 37 experience in a nutshell.

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268. Id. at 5.
269. Crook County v. All Electors, No. 05CV0015 (Crook County Cir. Ct., Aug. 1, 2006), available at http://www.doj.state.or.us/hot_topics/pdf/measure37/crook_co_decision.pdf.
270. Id. at 9.
271. Id. at 11.
273. Id. at 6.
274. Id.
275. The remaining two exceptions were not as problematic. The pornography and nudity dancing exception is probably unconstitutional under the Oregon Constitution, but it is also severable, so it was never likely to have much of an effect. Blumm & Grafe, supra note 2, at 347. See also Sullivan, supra note 16, at 145. The exception for regulations enacted before the owner or a family member of the owner acquired the property is relatively clear—it is “the only sure-fire exception.” Id. But even this exception is not free from ambiguity. Blumm & Grafe, supra note 2, at 347-48.
276. Measure 37, supra note 7.
278. Blumm & Grafe, supra note 2, at 336.
279. Id. at 335.
280. Id. at 333-34.
281. Id. at 330.
282. Measure 37, supra note 7. For a general discussion of this exception and an argument for construing it broadly, see Jeannie Lee, Tying Up Loose Ends: Resolving Ambiguity in Ballot Measure 37’s Public Health and Safety Exception, 38 Envtl. L. 209 (2008).
“welfare” is an indication that this exception is not meant to entirely swallow up the compensation requirement,283 the exception is otherwise rather ambiguous. For example, Oregon land use planning law generally “is explicitly premised on the necessity of planning to ensure citizens’ health and safety.”284 While a reading of the exception that would exempt all of land use law from the compensation requirement is presumably too broad, the language of the exception itself provides few clues as to how the reading should be cабined.

According to the president of OIA, this was inevitable: “It is hard to imagine how a legislative body (in this case the citizens of Oregon) could reasonably create . . . a list of which particular regulations . . . are designed to protect the public’s health and safety and which are designed to provide public benefits.”285 For this reason, “litigation over this exception is likely, until the Oregon appellate courts create a body of case law to guide future regulations and claims.”286

This attitude is misguided for three reasons. First, it is entirely possible to write a much more specific health and safety exception, as Measure 49 demonstrated.287 Second, courts are in a worse position than a legislative body to answer a question like this one. It would take time for any cases to work their way to the appellate courts, and even then each court would only answer the question before it rather than giving a comprehensive account of the exception. In this particular case, no court ended up interpreting the exception,288 so the process of defining it was not even under way. Third, failing to define the scope of the exception in the Measure itself leaves it open to definition by potentially hostile interpreters. In this case, the governor’s office defined the exception as applying to any law “reasonably related to the achievement of [either health or safety].”289 This definition would, of course, cover an enormous range of laws.

In sum, there was tremendous uncertainty about the breadth of the health and safety exception, and the most authoritative interpretation available was extremely broad. This frequently led to otherwise successful Measure 37 claims being derailed for failure to comply with regulations that were said to be health and safety-related.290

Finally, there is the federal law exception, which excludes regulations “[t]o the extent the land use regulation is required to comply with federal law.”291 That short phrase contains several obvious ambiguities, most notably what counts as “federal law” and what it means for federal law to “require” a regulation.292

Once again, in Sullivan’s view the exception is narrow, since federal law rarely “requires” any particular regulation.293 But again, this did not stop the Attorney General from issuing a rather broad interpretation of the similar provision in Measure 7, concluding that the exception applied to all laws that “give practical effect to something that federal law calls for or demands.”294 In addition, the only court to interpret the Measure 37 exception interpreted it quite broadly.295 At issue were land regulations passed by three Oregon counties that had to comply with a management plan issued by a state agency pursuant to an interstate compact that was sanctioned by a federal law; the Secretary of Agriculture had the responsibility for reviewing both the management plan and the local ordinances. The court held that the management plan had the force of federal law despite the fact that it was created by a state-level entity. But the more remarkable aspect of the court’s holding was its apparent assumption that any county regulation that was in good standing with respect to the management plan—regardless of how stringent—was required by the management plan.296 Needless to say, that is both a rather dubious interpretation of the word “required” and potentially a very blunt tool for local governments seeking to evade Measure 37 requirements.

The bottom line with respect to all three of these exceptions, then, is similar. They were written in a way that left their scope largely undefined, perhaps in the hope that courts would later flesh them out. In fact, however, they either remained uninterpreted, or were interpreted in an extremely broad way. As a result, to varying degrees, each of the exceptions posed an obstacle to the successful implementation of Measure 37.

4. Other Difficulties

There were many other ambiguities and difficulties impeding the implementation of Measure 37. It was unclear which government entity had the responsibility for compensating the claimant and the authority to waive the regulation.297 This was a particularly acute problem in Oregon, where many local regulations are state-mandated.298 When a local government refused to waive a state law, for example, was it properly recognizing the limits of its authority, or violating its obligations under Measure 37?299 The approach that seemed to be emerging was for claimants to apply for Measure 37 waivers with both the state and their local government,300 but considerable confusion remained about the proper interaction between the two levels of government.

283. Blumm & Grafe, supra note 2, at 337.
284. Id. at 338.
285. Huminicutt, supra note 40, at 42.
286. Id.
287. Blumm & Grafe, supra note 2, at 339.
288. Id. at 338.
290. Sullivan, supra note 16, at 145 (noting that health and safety exception was “being regularly used”).
291. Measure 37, supra note 7.
292. Blumm & Grafe, supra note 2, at 339.
296. Blumm & Grafe, supra note 2, at Crook County v. All Electors, No. 05CV0015 (Crook Co. Cir. Ct. 2006), available at http://www.doj.state.or.us/Hot_topics/pdf/measure37/crook_co_decision.pdf.
297. Id. at 320-23.
298. Blumm & Grafe, supra note 2, at 342.
299. Id. at 324 n.147.
Another problem stemmed from the fact that the Measure was retroactive, with claimants routinely challenging decades-old regulations. This meant that it was necessary to engage in “paleo-legal” research to determine what regulations were in force at distant points in time. This caused serious practical difficulties, as those regulations were sometimes not easily available. It also caused serious interpretive disagreements over the meaning of the old regulations.

There were also significant questions about what governments could demand as part of the application. State-level entities could point to the language in the Measure that prohibited local governments from requiring a permit application prior to the consideration of a Measure 37 compensation claim to argue that a state-level entity could require such an application. In addition, there were questions about what information governments could demand from Measure 37 claimants and whether it was permissible to charge a fee for processing Measure 37 claims. The fees charged by the counties ranged from zero to $1,500. Remarkably, Clackamas County demanded a $750 fee without revealing that the fee was actually optional; the county was not confident that it had the authority to charge a mandatory fee. While this might not seem like a big issue, it is worth remembering that many Measure 37 claimants were senior citizens, sometimes with very limited savings. In addition to all the other uncertainties of Measure 37, a significant fee could act as a serious deterrent to pursuing a Measure 37 claim.

The questions did not stop there. For example, there was uncertainty about the definition of owner (for example, does a spouse own property as of the date of the marriage certificate, or does an owner’s name have to be on the land deed?) and which laws counted as land use regulations (what about, for example, land division regulations?). In sum, there was a panoply of serious policy questions which were shrouded strategically compensating certain claimants to preserve particularly valuable regulations until there is a reliable valuation method in place. Knowing how much they would have to pay would enable governments both to decide which new regulations are worth adopting, and which old regulations are worth protecting. Ultimately, “public agencies need a sound valuation methodology to ally a functional planning system with the realities of the payment scheme set out in Measure 37.”

Unfortunately, though perhaps unsurprisingly, Measure 37 does not explicitly set out a methodology for calculating the loss of market value. Moreover, the method that was most commonly used is, at the very least, suspect. This is the “exemption method,” whereby the loss in fair market value is calculated by subtracting the current market value of the property from the market value it would have if the regulations were lifted only with respect to it.

One problem with this approach is that it fails to recognize that a regulation can affect the value of unregulated land as well as regulated land. Therefore, the difference between the two values may reflect—at least in part—an increase in the value of the unregulated land rather than a diminution in the value of the regulated land. The exemption method treats the claimant as a monopolist, allowing him to capture the value that comes from the fact that all the other properties in the area continue to be regulated.

The exemption method does not ask the right question, which is the following: what is the difference between the current value of the property and its value in a world where the regulation had never been enacted? This is a difficult question to answer, because the second value is hypothetical. One benefit of Measure 37 is that it has prompted a lot of fruitful thinking on how one might approach the issue. But the Measure itself had nothing to say on the topic, thus

5. Questions Concerning Valuation

There is one more issue that deserves a separate discussion because of how central it is to a workable compensation regime. This is the issue of how to calculate the reduction in the fair market value of a property due to the regulation being challenged. At first glance, it may seem as though this was not actually an important issue in Oregon, as neither state nor local governments had allocated money to pay compensation. Therefore, the only question was whether the property had lost any value, in which case the regulation had to be waived.

In fact, however, developing a uniform, workable, and accurate valuation method is “of paramount importance” to the administration of a program like Measure 37. There is something of a chicken and egg problem here. As long as governments never consider compensating the claimants, the precise valuation of their losses does not seem to matter. But governments will not be able to meaningfully consider strategically compensating certain claimants to preserve particularly valuable regulations until there is a reliable valuation method in place. Knowing how much they would have to pay would enable governments both to decide which new regulations are worth adopting, and which old regulations are worth protecting. Ultimately, “public agencies need a sound valuation methodology to ally a functional planning system with the realities of the payment scheme set out in Measure 37.”

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304. Sullivan, supra note 16, at 144.
306. Id.
307. Id.
310. Id. at 153. Multnomah County took the position that Measure 37 did not apply to land division regulations. Laura Oppenheimer, Land Spat Valued at $1.15 Million, THE OREGONIAN, May 19, 2006, at B1.
311. See supra note 142.
313. Id.
314. Id.
315. Id.
316. Id. at 577.
317. Id. at 579.
318. Id. at 583.
319. Id. at 592.
320. Id. at 585.
321. See generally id. (discussing and evaluating various approaches).
making it much less likely that the regime it was attempting to set up would function as intended.

III. The Lessons of Measure 37

Measure 37 has served as a source of inspiration to property rights advocates elsewhere. Recent regulatory takings initiatives, one of which passed in Arizona, were clearly modeled after Measure 37.322 The previous Part was intended to demonstrate that there are aspects of the Measure 37 that should not be emulated. This Part will summarize the lessons that should be derived from the Measure 37 experience. It will focus on drafting and program design, as well as on the importance of cooperation from state and local officials. It will also consider whether an effective takings regime can be put in place through initiative.

A. Learning From the Measure

I. Drafting and Design

Several kinds of drafting and design errors afflicted the Measure. First, there were simple omissions, which would not be difficult to fix. The failure to clearly provide for transferability of the compensation regime should interact with nuisance law and federal law, as well as, the questions of how lost value should be calculated and how much freedom local governments should be given in fashioning procedures for processing claims.

These are not mere questions of drafting; they are deeper questions about how a compensation program ought to work. The framers of future Measure 37 analogues should address these questions ahead of time, rather than merely replicating the language of Measure 37.

Another question that every regulatory takings initiative must address is whether it should follow Oregon’s lead and apply its compensation requirements retroactively, rather than only prospectively.323 In Oregon, this question was essentially predetermined, since the very motivation for Measure 37 was the perceived unfairness of the existing statewide land use planning program. But Measure 37’s retroactive application caused a lot of problems. It was responsible for the huge number of claims and the eye-popping compensation application caused a lot of problems. One interesting question, which is particularly important in light of the fact that the initiative process has been the main tool of regulatory takings reform advocates, is whether this is ever likely to happen in the context of an initiative.324

It is often said that initiatives tend to be more poorly drafted than legislation.325 There is generally less discussion, review, and feedback in the drafting of initiatives.326 Because drafters have absolute control over the measure’s language, other interested parties are unable to provide “input regarding the proposed measure’s legality and practical implications.”327 In addition, drafters of initiatives may have fewer resources and less experience,328 and they are not able to revise the language of the initiative after it has been circulated.329 Furthermore, a suitably sophisticated proposal might actually be less attractive to voters. It is generally difficult to get initiatives passed.330 As initiatives become more complex, voters will become increasingly confused by them;331 the conventional wisdom is that when voters are confused, they will tend to vote “no.”332

None of these general observations are dispositive. Sometimes initiative drafters are actually sophisticated repeat players who are capable of understanding the legal context and using the system to their advantage.333 In addition, voters sometimes appear to be quite rational and sophisticated in their evaluation of initiatives,334 and they are not necessarily deterred by complex initiatives.335 Still, there is reason to think that the difficult drafting and design problems associ-

322. See Gilbert, supra note 3, at 20, 22; Blum & Grase, supra note 2, at 352; Oppenheimer, supra note 34; Oppenheimer, supra note 36; Laura Oppenheimer, Meet the Money Behind the Measures, THE OREGONIAN, Oct. 13, 2006, at A1. See also Kennedy Smith, Other States Look to Create a Law Similar to Oregon’s Measure 37, DAILY J. COM., July 12, 2006.

323. Gilbert, supra note 3, at 25.
ated with crafting a regulatory takings regime will be a serious hurdle for the drafters of initiatives.

2. Official Hostility

The difficulties of Measure 37 also suggest that drafting may not be enough to make a compensation regime work. As we have seen throughout the previous Part, hostile officials and judges may have many levers for limiting the operation of a regulatory takings program. For one, they can create the possibility that the program will be eliminated entirely, either through political repeal or judicial invalidation. They can also change the rules mid-game, for example by extending the deadlines faced by governments. Furthermore, they can interpret the program’s provisions narrowly and the exceptions to it broadly. Local governments can postpone the consideration of claims or refuse to allow development on grounds other than the challenged regulation. They can also implement onerous procedures that reduce the number of claims.

This sort of problem is not uncommon. Although initiatives are capable of effecting powerful social change, they also frequently go “unimplemented and subverted.” In fact, the policies that are most likely to be enacted via initiative are the ones that are least likely to be enforced; this is because initiatives are generally used for policies the government refuses to provide, so they tend to encounter strong opposition post-enactment.

Can a regulatory takings initiative avoid or at least limit this kind of interference? Elisabeth R. Gerber, Arthur Lupia and Mathew D. McCubbins have identified four factors that affect the likelihood of implementation. Implementation becomes less likely as the technical and political costs of implementation increase, and as the number of actors required for full implementation increases. Implementation becomes more likely as the availability of effective sanctions for noncomplying officials increases, and as noncompliance becomes more observable.

The practical consequence of this is that the most successful initiatives are often simple proposals where noncompliance is easy to observe. For example, term limits are successful initiatives are often simple proposals where noncompliance is easy to observe. For example, term limits are extremely unpopular with state politicians, but failure to comply is easy to observe and noncompliance is easy to enforce; this is because initiatives are generally used for policies the government refuses to provide, so they tend to encounter strong opposition post-enactment.

Another example is California’s famous Proposition 13, whose “effect was a more than fifty percent reduction in local property tax collections across the state.” The proposition has had a lasting and considerable impact, and inspired many similar measures in other states. On the other hand, complicated initiatives that require the participation of many actors and make it hard to observe noncompliance are much less likely to be enforced; for example, “a comprehensive education reform... is unlikely to be fully or effectively implemented.”

On the face of it, this analysis is not promising for regulatory takings initiatives. After all, they seem likely to encounter official opposition; they are quite complex; and they will always require the cooperation of multiple actors. Perhaps it is the case that hostile elites can always thwart the effective implementation of these initiatives. This would dilute or eliminate the biggest advantage of initiatives, namely that they circumvent the normal political process.

Two points should be made about this pessimistic view. First, there are steps that can be taken to increase the likelihood of implementation. The first of these has to do with a familiar issue, namely drafting. Gerber, Lupia and McCubbins note that vague initiatives leave officials room for interpretation, make sanctions more difficult to apply, and render implementation less likely. This point illustrates the dangers of the approach, which I criticized earlier, of deliberately making the initiative vague and hoping that the courts will fill in the details. The Measure 37 experience demonstrates that precise drafting can constrain officials, while imprecise drafting invites noncompliance.

For example, Measure 37 was appropriately drafted as a statutory amendment to avoid the Oregon Supreme Court’s constitutional holding striking down Measure 7. Arguably idiosyncratic circuit court判决 still struck Measure 37 down, on a variety of very implausible grounds. If the entire judiciary were willing to embrace those sorts of arguments, no amount of careful drafting would save an initiative like Measure 37. But the arguments turned out to be too implausible for the Oregon Supreme Court, which unanimously overturned the lower court’s decision, vindicating the prediction of Stephen Geoffrey Gieseler and his colleagues that “[t]he reasoning behind the [lower court] decision is so untenable that—even in a court system unfriendly to the Measure 37 experience demonstrated that precise drafting can constrain officials, while imprecise drafting invites noncompliance.


339. Id.; see Garrett & McCubbins, supra note 337, at 340-42 (discussing the four principles).

340. Id. at 341.


343. Id. at 613.


346. The question of whether Measure 37 was simply too complex to be put into place by initiative was raised in Oregon. Andy Parker, On Land Use, the Problem & the Process, The Oregonian, Oct. 24, 2005, at D1.

347. Id. at 320.


349. See supra notes 285-89 and accompanying text.


351. See supra notes 166-69.


353. See supra Part II.B.1.

to the rights of property owners—it is hard to imagine it being upheld on appeal.”

In summary, the lesson of Measure 37 is that putting in place a successful regulatory takings regime requires careful drafting and design, as well as a way of avoiding interference from judges and officials. Accomplishing this via initiative would be difficult, but not necessarily impossible. In addition, an initiative of this sort could play a different role, by changing the terms of the discussion and forcing the government to become more responsive.

We now turn to the question of how these issues played out in two post-Measure 37 contexts: Oregon’s Measure 49 and Arizona’s Proposition 207.

B. Measure 49

As described above, Measure 49 was a Measure 37 “fix” that was referred to the voters by the 2007 legislature and ratified in the 2007 election. It is clear that, at least to some extent, it was intended to undo Measure 37 rather than to improve it; indeed, Measure 37’s biggest proponents opposed Measure 49, while Measure 37’s critics tended to favor it.

It is a bit odd, then, to think of Measure 49 as an attempt to learn from Measure 37’s mistakes and set up a more effective compensation regime. And, indeed, that would be an exaggeration; Measure 49 imposes some severe limitations on the Measure 37 right to compensation, and introduces some ambiguities of its own.

That is not the whole story, however. Somewhat surprisingly, Measure 49, pushed by Measure 37’s opponents, is likely to set up a compensation regime that is more effective than Measure 37 was. There are two major reasons for this. First, Measure 49 is much more carefully drafted than Measure 37. Second, it may represent a genuine commitment by Oregon’s elites to the idea of limited compensation for landowners.

I. The Limitations of Measure 49

The main reason that Oregonians in Action, as well as several of the Measure 37 claimants I spoke to, opposed Measure 49 is that it severely restricts the Measure 37 compensation right. First, it limits compensation to claims for residential development; commercial and industrial claims

355. Gieseler et al., supra note 130.
356. Garrett, supra note 345, at 34.
357. See Garrett & McCubbins, supra note 337, at 340-42.
358. Selmi, supra note 325, at 300.
359. Miller, supra note 327, at 1051.
363. Id. at 224.
364. There is some reason to believe that some Oregon politicians viewed Measure 37 as an attempt by the electorate to demand government action by uprooting the existing system. Cf. Aoki, supra note 106, at 438-39 (noting that at least one politician held this view).
365. See supra Part II.B.2.
366. Modifies Measure 37; Clarifies Right to Build Homes; Limits Large Developments; Protects Farms, Forests, Groundwater, Measure 49 (2007), available at http://www.sos.state.or.us/elections/nov2007/guide/m49_br.html.
369. Hunnicutt, supra note 240.
370. Interview with Dawn Dutton, (indicating that she voted against Measure 37, but would now vote against Measure 49) (on file with author); Interview with William Erickson (Aug. 20, 2007) (on file with author) (asserting that “[M]easure 49 is why people hate government”); Interview with Virginia MacBride (Aug. 19, 2007) (stating that Measure 49 “stops anybody for anything” and that the fast track will not actually work) (on file with author); Interview with Berj Martin (Aug. 20, 2007) (stating that he hopes that Measure 49 “fails miserably” and the Measure 49 “is a nightmare”) (on file with author).
are eliminated entirely.\textsuperscript{371} Secondly, it puts an overall limit of 20 dwellings on any given owner across all claims.\textsuperscript{372} Meanwhile, the vaunted “fast track” is limited to just three dwellings.\textsuperscript{373} There is a procedure for making a claim for four to 10 dwellings,\textsuperscript{374} but it requires a showing of lost value that is sufficiently difficult that at least some observers expected this aspect of the Measure to be a virtual dead letter.\textsuperscript{375} This prediction has been vindicated, with 91% of Measure 49 claimants taking the fast-track option.\textsuperscript{376}

Crucially, Measure 49 requires all Measure 37 claimants to proceed under the new Measure 49 procedures unless they have acquired “a common law vested right.”\textsuperscript{377} Perhaps because they were unable to come to a consensus on the question of which Measure 37 claims should be allowed to go forward,\textsuperscript{378} the drafters of Measure 49 failed to provide a definition of “common law vested right.” The question of what it means for a right to vest has already become very contentious, demonstrating that Measure 49 has introduced some confusion of its own.\textsuperscript{379}

Most likely, the courts will determine whether rights have vested by relying on a traditional multivariable test, including factors such as how much the landowner has spent on development and whether the development was done in good faith.\textsuperscript{380} The question of how this test will actually be applied by the courts remains open (though early indications are not positive for claimants).\textsuperscript{381} As a Portland land use attorney has noted, landowners who have started construction but have not progressed very far are in a particularly uncertain position.\textsuperscript{382} Much like the ambiguities of Measure 37, this ambiguity has already caused multiple lawsuits\textsuperscript{383} and divergent interpretations by different local governments.\textsuperscript{384} Clackamas County, for example, has adopted the aggressive interpretation that all development undertaken after Measure 49 was placed on the ballot in June was in bad faith and does not contribute to the vesting of rights.\textsuperscript{385}

In short, it is clear that Measure 49 drastically limits Measure 37 rights. Other features of Measure 49, however, suggest that it will be more effective at guaranteeing those limited rights.

2. The Drafting of Measure 49

The most striking difference between Measure 49 and Measure 37 is their length: Measure 49 is more than 10 times longer. Its 21-page length suggests that, unlike Measure 37, it might actually be sophisticated enough to adequately address the problem of putting a regulatory takings regime in place. Measure 49 was a result of a careful drafting process;\textsuperscript{386} its superior drafting should make it easier to administer\textsuperscript{387} and a more reliable source of relief for qualifying claimants.\textsuperscript{388}

A few examples will suffice to illustrate the qualitative difference between Measure 49 and Measure 37. Measure 49 directly addresses the question of transferability, stating clearly that waivers are transferable.\textsuperscript{389} It clarifies the scope of the federal law\textsuperscript{390} and health and safety exceptions,\textsuperscript{391} and defines land use regulation\textsuperscript{392} and owner\textsuperscript{393} more carefully than Measure 37. It also sets out a valuation method for demonstrating loss of value,\textsuperscript{394} as well as the procedures local governments are to follow in processing claims.\textsuperscript{395} Measure 49 also takes affirmative steps to create a better-functioning regime, such as creating an ombudsman to help claimants navigate the process.\textsuperscript{396}

In short, many or most ambiguities that bedeviled the implementation of Measure 37 are directly addressed by Measure 49. So far, it appears that Measure 49 is in fact operating much more smoothly than Measure 37 had been;

\begin{thebibliography}{99}
\bibitem{371} Measure 49, supra note 366, §4.
\bibitem{372} Id. §11(5).
\bibitem{373} Id. §6(1).
\bibitem{374} Id. §7.
\bibitem{375} An Express Lane, supra note 238.
\bibitem{376} Peter Wong, Many Measure 49 Landowners Settle, \textit{Statesman J.} (Salem, Or.), Aug. 6, 2008, at 16.
\bibitem{377} Measure 49, supra note 366, §5(3).
\bibitem{378} Interview with Jennifer Hughes, \textit{supra} note 142.
\bibitem{379} See, e.g., Beth Casper, Land Case May Test “Vested Rights,” \textit{Statesman J.} (Salem, Or.), Mar. 25, 2008; Beth Casper, Land-Use Hearing Raises Arguments About Rights, \textit{Statesman J.} (Salem, Or.), July 30, 2008; Eric Mortenson, Oregon Fights Its Land-Use Skirmishes One by One, \textit{The Oregonian}, July 7, 2008, at B1. The uncertainty surrounding vested rights has manifested itself in some absurd ways. For example, one developer apparently put up tiny plywood “place-holder” houses on the lots in his proposed subdivision to increase the odds that the rights would vest. Mortenson, supra note 161.
\bibitem{381} The first court decision on this issue declined to find that a developer’s rights had vested even though the developer had spent $1.3 million developing a subdivision. Although the decision was nonprecedential, it was understand-ably viewed by some as a bad sign for future claims. Eric Mortenson, Land-Use Ruling: A Bellwether?, \textit{The Oregonian}, June 16, 2008, at B1. See also Oregon Appeals Court Allows Taller Power Poles, \textit{The Associated Press State & Local Wire}, February 21, 2009, 8:13 p.m. (describing an Oregon Court of Appeals ruling rejecting an appeal of a Measure 37 waiver on the grounds that the dispute is moot due to Measure 49). But see Ore. Judge Allows Rural Subdivisions to Go Ahead, \textit{The Associated Press State & Local Wire}, Nov. 21, 2008, 12:30 a.m. (describing a state court decision which held that a group of property owners had invested enough to vest their rights; this decision, however, is expected to be appealed).
\bibitem{382} Mortenson, supra note 156.
\bibitem{383} Zuckerman, supra note 243.
\bibitem{384} Justin Much, County Approves Ordinance to Deal With Land Use, \textit{Statesman J.} (Salem, Or.), Jan. 23, 2008, at 3; Zuckerman, \textit{supra} note 241.
\bibitem{385} Zuckerman, \textit{supra} note 241.
\bibitem{387} Interview with Jennifer Hughes, \textit{supra} note 142 (describing ways in which Measure 49 would be “administratively easier”).
\bibitem{388} Shetterly, \textit{supra} note 169.
\bibitem{389} Measure 49, \textit{supra} note 362, §11(6).
\bibitem{390} Puskas, \textit{supra} note 8, at 1313.
\bibitem{391} Measure 49, \textit{supra} note 362, §2(18). Blumm and Grafe point out that even the Measure 49 definition does not answer all the questions about which regulations are covered by the exception. Blumm & Grafe, \textit{supra} note 2. This is true, and it is a helpful reminder that legal language is inevitably imprecise and no amount of drafting can produce a measure that is free of ambiguities. Nevertheless, this observation should not obscure the point that the Measure 49 definition is a significant improvement over Measure 37.
\bibitem{392} Measure 49, \textit{supra} note 362, §2(14).
\bibitem{393} Id. §2(16).
\bibitem{394} Id. §7(6).
\bibitem{395} Id. §13.
\bibitem{396} Id. §17. See \textit{A Winfall for Fairness}, \textit{supra} note 382 (“An ombudsman is available to sniff through red tape, leap tall bureaucratic obstacles and help property owners with special needs navigate the system.”).
\end{thebibliography}
claimants are now “forgoing lawsuits and proceeding with the options available under Measure 49.”397 Property rights advocates in other states may not like the substantive changes made by Measure 49, and prefer the expansive rights granted by Measure 37. However, when it comes to drafting the language of a regulatory takings measure in sufficient detail, they would be better off taking their cues from Measure 49.

3. Measure 49 as Commitment to Change

As we saw earlier in this Part, a regulatory takings regime can be seriously threatened by hostility from the political elites. Another reason to be optimistic about Measure 49 is that it may represent a commitment by Oregon’s elites to its limited aims. This commitment is very difficult to pin down or quantify, but there are hints that it is present. First, Measure 37 has shaken up Oregon land use politics and forced the defenders of the status quo to take the idea of reform and compensation seriously. This may be Measure 37’s greatest success. Second, a limited but effective right to compensation was the major selling point of Measure 49, and the government may feel compelled to deliver on that promise (if only to avoid another Measure 37-like revolt).

One illustration of the new thinking prompted by Measure 37 is the story of the “Big Look” land use task force, which was created by the 2005 legislature, “partly in response to Measure 37,”398 for the purpose of reevaluating Oregon’s land use system and presenting recommendations to the 2009 legislature.399 The task force’s preliminary findings, presented in 2007, suggested that Oregon’s land use system was too rigid and that private property rights needed to be recognized more explicitly.400 Toward the end of the 2007 legislative session, funding for the task force was abruptly eliminated, with opponents of Measure 49 alleging that the task force was defunded because its findings interfered with the pro-49 campaign.401 Interestingly, however, the interest in pursuing the Big Look project did not abate after Measure 49 was enacted. Indeed, the task force “never had so many friends” as it did after the passage of Measure 49.402 Both pro- and anti-Measure 49 partisans called for the restoration of funding to the group; so did a number of newspapers, the governor, and the senate president.403 Even The Oregonian, which is staunchly pro-planning and anti-Measure 37,404 mused that “[t]he public’s approval of Measure 49 last month affirms our state has done something right, but doesn’t mean the system should be preserved in amber.”405 Already, the Big Look task force has recommended greater land use flexibility for rural counties, in order to “defuse the rural resentment that brought about Measure 37.”406 Its proposals seem likely to get serious consideration in the state legislature.407

Underlying this support for reform was the understanding that Measure 37 might not have been a one-off event.408 Noting that “Oregonians appear open to blandishments . . . to change [the land use] program for the worse,” Sullivan concludes that “old orthodoxies are no longer sufficient” and that “[o]nly a comprehensive and thoughtful review of the system will preserve what is good and provide the consensus to change what must be changed.”409 Striking a similar note, a member of the Big Look task force has predicted that failure to address the underlying tensions of the land use system “will cause further ballot measures that will undermine and ultimately destroy the system that was created in the 1970s.”410 Even a spokesman for the Democrats in the House of Representatives has recognized that Measures 7, 37, and 49 represented widespread frustration with the land use system, and that the public’s concerns on this score must be handled better in the future.411

The same realization underpins Measure 49 itself; far from repudiating Measure 37 outright, Measure 49 actually coopts the values upon which Measure 37 was based.412 Indeed, Measure 49’s statement of “legislative policy on fairness to property owners” explicitly states that “[i]n some situations, land use regulations unfairly burden particular property owners” and that “[t]o address these situations, it is necessary to amend Oregon’s land use statutes to provide just compensation for unfair burdens caused by land use regulations.”413 This idea attracted some surprising adherents. As Hunnicken notes, the “most zealous advocates” of statewide planning had spent millions of dollars to pass a measure that explicitly enshrines the idea of compensation.414 Even The Oregonian restored.

397. Mortenson, supra note 375. See id. (noting that “judges are gradually combing out the tangles in Measure 49” and that several recent court decisions “have provided clarity to thousands of property owners,” and quoting Lane Shetterly for the view that “Measure 49 is doing what it was intended to do”). See also A Windfall for Fairness, supra note 382 (noting that there will apparently be no Measure 49 payday for lawyers, and that the number of lawsuits has dropped from 300 to about 80).
402. Mortenson, supra note 395.
403. Id.; Peter Wong, Measure 49 Vote Revives Interest in Land-Use Task Force, Statesman J., Nov. 8, 2007, at 1. Funding for the task force has now been
defended Measure 49 in terms of fairness\textsuperscript{415} and welcomed its passage as a return to the center in Oregonian politics.\textsuperscript{416} This is a remarkable testament to the impact of Measure 37 on the climate of ideas in Oregon. It is quite surprising to see so many planning advocates supporting a measure that might cause the idea of compensation for economic harm to become “hard-wired . . . into public expectations” in the way that other aspects of the land use system have.\textsuperscript{417}

The premise of Measure 49 is that it would limit the range of permissible claims, but make the process of vindicating claims easier and more reliable than it had been under Measure 37.\textsuperscript{418} To fulfill that commitment, and to prevent future versions of Measure 37 from arising, the Oregon government will have to make sure that at least the promise of the “express lane” for claimants trying to build three or fewer homes is fulfilled. The Oregonian has called on the authorities to ensure just that.\textsuperscript{419} While there have been delays,\textsuperscript{420} there are also indications that the state government is taking the project seriously. For example, the state Emergency Board has recently allocated $486,000 to accelerating the process, and the state has developed a “historical matrix of county zoning ordinances and permitted developments”—the kind of database that is necessary to address the problem of “paleo-legal” research.\textsuperscript{421}

The overwhelming majority of Measure 49 claimants are opting for the express lane. While some potential legal hurdles remain, the president of Oregonians in Action is optimistic\textsuperscript{422} and the director of the Department of Land Conservation and Development expects Measure 49 to result in 13,000 additional rural homes over the next decade.\textsuperscript{423} The current expectation that the limited rights guaranteed by Measure 49 will be vindicated seems to have created a more peaceful atmosphere on land use issues in the state.\textsuperscript{424} In a particularly striking example of this, Oregonians and Action and 1000 Friends of Oregon are both backing a bill that would relax certain procedural requirements in order to allow a broader set of Measure 49 claims to be considered.\textsuperscript{425} The bill also provides for an investigation of a number of claims that were never fully completed, with the prospect of considering even those claims in the 2010 session.\textsuperscript{426}

In short, Measure 37 has made Oregon elites much more aware of the need to reexamine the land use system and the dangers of neglecting to do so. It has also made the idea of limited compensation more acceptable to the pro-planning faction in Oregon. In the end, Measure 49 might enjoy sufficient support from Oregonian officials to make it significantly more effective than Measure 37 had been.

C. Proposition 207

Arizona’s Proposition 207\textsuperscript{427}—the only one of the initiatives modeled after Measure 37 which passed in 2006—was similar to Measure 37 in that it attempted to introduce a “sweeping change” to the state’s land use law.\textsuperscript{428} There were two crucial differences between the two measures, however. First, Arizona had a vastly less restrictive land use system than Oregon, and second, Proposition 207 was not retroactive.\textsuperscript{429} Notably, the draft of the proposition was made nonretroactive as a result of a meeting between its supporters and opponents that was requested by legislative leaders.\textsuperscript{430} In a testament to the importance of this sort of forethought, the lack of retroactivity helped prevent any “significant public backlash” against the proposition.\textsuperscript{431}

Both of the differences between the two measures suggest that any difficulties associated with Proposition 207 would not be nearly as urgent or overwhelming as the problems of Measure 37.\textsuperscript{432} In light of this, it is not implausible to say that “there are simply too many dramatic differences”\textsuperscript{433} between the two to make comparisons worthwhile. On the other hand, we should expect that the similar drafting of Proposition 207 should lead to at least some of the same problems. Viewed through this lens, Proposition 207 provides further support for the observation that drafting is crucially important to the smooth operation of the regimes set up by regulatory takings initiatives.

Though it makes some advances over Measure 37 (most notably, it addresses transferability\textsuperscript{434}) it is otherwise quite similar to Measure 37 in its brevity and ambiguity.\textsuperscript{435} Once again, there are extremely imprecisely worded exceptions,\textsuperscript{436} insufficiently careful definitions of “owner” and “land use law,”\textsuperscript{437} and a lack of attention to what procedures local governments may use in processing claims. Oregon’s experience


\textsuperscript{418} Mortensen, supra note 31 (“Backers said Measure 49 would allow ‘the little guy’ to build a home or two but would prevent rampant development.”); Shetler, supra note 169.

\textsuperscript{419} An Express Lane, supra note 238.

\textsuperscript{420} Editorial, Doing the Hustle, The Oregonian, Dec. 15, 2008, at ETP (criticizing state government for delays).


\textsuperscript{422} Morterson, supra note 31.


\textsuperscript{424} Id.

\textsuperscript{425} Peter Wong, Bill Allows Some Land-Use Claims to Be Considered, STATESMAN J. (Salem, Or.), Apr. 16, 2009, at 3.

\textsuperscript{426} Id.


\textsuperscript{428} Gammage, supra note 324, at 519.

\textsuperscript{429} Id. at 526.


\textsuperscript{431} Id.

\textsuperscript{432} See Gammage, supra note 324, at 526.

\textsuperscript{433} Id. See Kerry Felt-Snyder, Smokers, Low-Wage Earners to Feel Effects of Propositions, The Arizona Republic, Nov. 9, 2006, at 4 (noting that, because Proposition 207 is not retroactive, there is no immediate crisis and the initiative will take years to play out).

\textsuperscript{434} Arizona Proposition 207, supra note 427, §12-1154(f).

\textsuperscript{435} For a discussion of the difficulties presented by the ambiguities of Proposition 207’s text, see Gammage, supra note 322, at 523-24. These difficulties, unsurprisingly, were distinctly similar to the difficulties presented by Measure 37.

\textsuperscript{436} Arizona Proposition 207, supra note 427, §12-1154(b).

\textsuperscript{437} Id. §12-1136.
with Measure 37 suggests that all this should amount to confusion and paralysis. So far, Arizona’s experience bears out this prediction.

Because of the measure’s vague language, test cases are needed to map out its scope. But no government wants to be the guinea pig for such a test case. While several lawsuits have been either launched or threatened, it does not appear that any of them have yet shed much light on the measure’s meaning. So far, the result is something approaching paralysis, with several large cities affected by the uncertainty caused by the measure. Government entities have adopted several strategies for dealing with Proposition 207, but none are terribly promising. One of the most common strategies, attempting to get waivers from all affected landowners, is potentially vulnerable to legal challenge, particularly if it is applied aggressively; more to the point, it is frequently impractical. For example, Phoenix had to delay two downtown revitalization projects, each of which would have required obtaining over 1,000 waivers.

As in Oregon, ambiguities in the law have created a panoply of problems. For example, the state senate declined to ban the building of homes near military airfields in part to avoid a potential Proposition 207 lawsuit; it was unclear whether such a ban would be justified by Proposition 207’s health and safety exception. In a similar vein, the city of Phoenix has claimed that Measure 207 has tied its hands in a dispute involving the pipeline that supplies fuel to the Phoenix airport, and Tucson was hesitant to simplify and reorganize its land use code for fear of lawsuits.

One city official has complained that the wording of the Proposition is “very poor, very vague, leaving a lot of open questions.” The city of Peoria has attempted to clarify the issues by promulgating its own interpretation of the law. The other potential means of clarifying the law’s meaning—legislative action, another initiative, or judicial interpretation—are viewed as “long shots.”

This sort of uncertainty and paralysis is a far cry from a functioning compensation regime in which governments internalize the costs of the regulations they impose. But this was to be expected from a law whose drafting was scarcely better than that of Measure 37.

IV. Conclusion

The story of Measure 37 shows that the goal of forcing governments to compensate landowners for the regulations that impact their property, though it might be worthwhile, is not easy to accomplish via initiative. On the other hand, Measure 37 also demonstrates that it is possible for an initiative to succeed in a more roundabout way by challenging the established system and forcing the legislature to come up with an alternative that at least partially adopts the initiative’s values. It will be interesting to see whether Measure 49’s commitment to compensation will produce a regime that is more effective, if less ambitious, than the one contemplated by Measure 37.

Perhaps Measure 37’s greatest contribution, however, will be the lessons it has to offer to property rights advocates elsewhere. Rather than copying Measure 37, groups that are sympathetic to its vision should take care to learn from its mistakes. The biggest lesson offered by Measure 37 is that designing a regulatory takings system is no simple task. It requires careful drafting, a serious engagement with conceptually difficult issues and careful attention to the problem of ensuring implementation. It is only by making such an effort that the regulatory takings movement can create a regime that successfully forces governments to take the costs of land use regulation into account.


439. Id. See also Mike Sunnucks, Prop. 207 Results in a Tickle of Lawsuits—Not a Wave, PHOENIX BUS. J., Nov. 12, 2007.


441. See Sparks, supra note 112, at 214 (noting that “regulating authorities appeared hesitant to test the new law or property owners’ willingness to demand compensation” and that “Arizona’s cities, towns, and counties are proceeding cautiously, trying to regulate without provoking property owners”).

442. Id. at 218.

443. See Stephenson & Lane, supra note 430 (describing the strategies).

444. See Sparks, supra note 112, at 224-29.


449. Cecilia Chan, Clarity Sought on Land-Use Law, The ARIZONA REPUBLIC, Jan. 17, 2007, at 15. For another discussion of the difficulties cities were having with Proposition 207, see Gammage, supra note 324, at 326-27.


451. Id. (quoting city attorney).