

**Finding a Fair Balance between Protecting Individual
Property Rights and the Public Good**

**A Policy Analysis of Valuation Methods Under
Property Rights Laws**

**Jeannine Rustad
Portland State University
Field Area Paper 2008**

Executive Summary

Oregon has long been known for its land use system intended to protect farm and forest land by restricting urban growth. In recent history, Oregon has received notoriety for its aggressive property rights ballot measures.

Oregonians first approved a property rights ballot measure (Measure 7) in 2000. After the Oregon courts ruled this measure unconstitutional, a second successful ballot measure (Measure 37) was approved by the voters in 2004. Ballot Measure 37 required state and local governments to either compensate property owners for lost value caused by land use regulations or waive those regulations adopted after the property owner acquired their property. The response to Measure 37 was astounding; with 6,857 claims filed with the state seeking compensation in the amount of more than \$19,844,379,986. No evidence to support claims of loss in value under Measure 37 was required. Compensation requests were based on the market value of the property in question absent regulations, as opposed to the loss in value caused by the regulations, resulting in what appeared to be a windfall for claimants. This windfall is caused by the fact that, removing regulations from one property while remaining in force on surrounding properties concentrates the demand for residential development on the claimant's suddenly "scarce" property.

In reaction to the amount of claims and compensation sought under Measure 37, in 2007, the legislature put Measure 49 to vote. Measure 49 was approved by a margin of 62% to 38%. Measure 49 represents an attempt to find a better balance between protecting the public good without overburdening individual property owners. The measure has two remedies: (1) the fast track, which allows construction of up to three

houses (including existing houses) or lots, if allowed when the claimant acquired their property, without a need to show a loss in value; or (2) claims for 4 and 10 houses, if allowed when the claimant acquired the property, if such a loss in value is documented by an appraisal of the fair market value one year before and one year after the enactment of a specific land use regulation.

This purpose of this paper is to explore how the effects of government actions on real property can be valued. The goal is to find a fair and balanced method of valuing the impact of land use regulations and other government actions affecting property values. To be “fair and balance,” a method of valuation must take into consideration the rights of the individual property owner, neighboring property owners, the public good and government interests. If possible, a fair and balanced method will not overly burden one of these interests over others.

The first section of the paper will summarize Oregon’s land use regulatory history so as to gain an understanding of the tensions that gave rise to the property rights movement in Oregon. The second section contains an analysis of valuation under Measure 37 and 49, as well as valuation under statutes both adopted and proposed in other states to see what insight these regulations and proposals offer on finding a fair and balanced method of valuation. The third section evaluates four methods of valuation: (1) monopoly method; (2) economist approach; (3) appraisal method; and (4) Measure 49. Criteria used for this evaluation are: (1) clarity – how easily understood is a given valuation method; (2) cost – both to a claimant and the government; (3) fairness and accuracy – avoidance of under- or over-valuing the effect of a regulation; and (4) ease of implementation – in terms of time and resources.

How we measure the effect of government actions is only part of the equation. As illustrated by property rights laws in Florida and Texas, additional factors to be considered in drafting a property rights regulation include (1) prospective versus retroactive application, (2) short statute of limitations for filing a claim, (3) use of appraisals in support of a claim of loss of value, (4) options of relief that the government may offer a claimant and (5) in the case of Texas, as well as Louisiana and Mississippi's right to farm laws, the use of thresholds before compensation is due for reduction in value caused by government action. This paper will explore these factors, as well as consideration of value added by regulations, recapture of tax credits and other incentives and the need for proportionality between compensation and the loss of value caused by government action.

The final section contains recommendations for drafting property rights laws. The recommended method for valuing loss caused by government action is the appraisal method. However, this, alone, does not answer the question of how we can fairly balance the potentially conflicting interests of property owners, neighboring property owners, the common good and government. To fully answer this question, recommendations include:

- The prospective application of property rights laws;
- The need for a relatively short statute of limitations for filing a claim after a regulation is adopted;
- Consideration of value added by government regulations;
- The use of thresholds to recognize both inherent risks in owning property, as well as benefits of government regulation and actions;
- The need to recapture direct benefits, such as tax abatements or credits, once a claim for compensation is filed;
- The need for relief to be proportional to the loss;
- Flexibility in the methods for granting relief; and
- Exemptions for certain types of government action.

These factors will help frame the conversation as to what constitutes a fair and balanced approach to measuring loss of value caused by government actions and providing compensation. However, any conversation concerning property rights laws should include efforts to reeducate the public about the benefits of government regulation and action, as well as the interdependency of property rights. In addition, when adopting new land use regulations, governments should consider performing assessments of the impacts of the regulation and providing such information to the public for comment.

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Problem Statement

Oregon has faced a turbulent past eight years with the rise of the property rights movement. While Measure 49 has returned some semblance of normalcy to land use in Oregon, the property rights movement has taken hold in other states. It is unlikely the issue of how much government regulation on real property is too much will go away any time soon.

One of the crucial factors in property rights regulations is to determine loss of value. This paper will explore various methods of valuation. In addition, this paper will explore additional significant factors, including timing of measurement, value added by regulations, recapture of benefits, such as tax credits and incentives, and percentage loss threshold.

The purpose of this exploration is to find a fair and balanced method of valuing the impact of land use regulations and other government actions affecting property values. To be “fair and balance,” a method of valuation must take into consideration the rights of the individual property owner, neighboring property owners, the public good and government interests. If possible, a fair and balanced method will not overly burden one of these interests over others.

To be fair, the method must not create a windfall for the property owner but must, instead, compensate the owner for the reduction in value actually experienced (plus interest, where applicable). Fairness must also take into account the benefits of property regulations, as well as effects of “waivers” of land use regulations (such as those granted under Measure 37) on neighboring landowners. This last factor is important because both Measures 37 and 49 create a special class of property owners, as only those who owned

their property at the time of adoption of a regulation are eligible to file a claim. Thus, only long-term property owners are eligible for a waiver to allow a use that is inconsistent with existing land use regulations. Such uses can potentially give rise to land-use conflicts.

While this paper will focus on valuation of the effects of land use regulations in Oregon, the intent is that this research will have broader applicability and will be of use to other states that may consider (or reconsider) property rights legislation.

Introduction

Measure 37

On November 2, 2004, Oregonians overwhelmingly passed Measure 37 by a margin of 61% to 39%. Measure 37 (ORS 197.352) became effective on December 2, 2004, and required state and local governments to either compensate property owners for lost value caused by land use regulations or, in the alternative, waive those regulations adopted after the property owner acquired their property. By judgment dated October 24, 2005, the Marion County Circuit Court declared Measure 37 unconstitutional and invalid. This decision was reversed by the Oregon Supreme Court on February 21, 2006, and Measure 37 was reinstated on March 13, 2006.

As of December 5, 2007, the deadline for filing claims based on historic regulations, the State of Oregon received 6,857 claims seeking compensation in the amount of more than \$19,844,379,986 (oregon.gov/LCD/MEASURE49/summaries_of_m37_claims.shtml). This number made valuation of claims a crucial issue.

Measure 49

On November 6, 2007, Oregonians had a second chance to speak on property rights legislation with Measure 49. Measure 49 was approved by a margin of 62% to 38% (Secretary of State). Measure 49 allows for the construction of up to three houses (including existing houses) or lots, if allowed when the claimant acquired their property, without showing of loss in value. A claimant may seek to build between 4 and 10 houses, if allowed when the claimant acquired the property, if such claim is supported loss in value caused by regulations, which must be shown by an appraisal showing the fair market value one year before the enactment of the land use regulation that was the basis for the claim and the fair market value of the property one year after the enactment (Oregon Ballot Measure 49).

Measure 49 arose out of the need to make reason out of the chaos Measure 37 left in its wake. While Measure 49 should help Oregon deal with the onslaught of claims filed against the state, given the rise in popularity of property rights laws nationwide, the question of valuation remains important. Indeed, given the rise in popularity, it may be even more important to find a fair and balanced method of valuing the impact of land use regulations and other government actions affecting property values.

The Growing Popularity of the Property Rights Movement

Since the approval of Measure 37 in 2004, six other states (Washington, California, Idaho, Arizona, Montana and Nevada) proposed property rights legislation. Washington, California and Idaho defeated their ballot measures. Arizona approved its ballot measure, and courts threw out the ballot measures in Montana and Nevada, preventing them from going to vote. The 2006 elections illustrate that we have,

undoubtedly, not seen the end of this aspect of the property rights debate. While one can hope that the tide has been stemmed with the Oregonians' 2007 approval of Measure 49, the property rights movement has, if nothing else, raised the call for greater fairness in land use regulation. Fairness must be balanced between the rights and interests of property owners, neighboring property owners, the public and good and governments.

The Shift Away from the Common Good

The property rights movement represents a shift from the common good and has distorted the notion of property rights beyond anything our founding fathers envisioned. While the social dimension of property rights has been “long integral in our legal system” (Cordes), “the idea that we can use our property in any way we choose is not, and never has been, a constitutional right” (Pease). With regard to individual property rights, what we see protected throughout history has an emphasis on *existing* uses rather than potential future uses (Cordes). Property rights laws have turned this emphasis on its head, focusing on potential future uses, as opposed to existing uses.

Although we are not constitutionally guaranteed the right to use our property as we see fit, the property rights movement that has emerged in recent years has attempted to ensure this right. The result is that land is no longer seen as something to use for the common good but, rather, for one's own benefit, irrespective of the cost to society (or even one's own neighbor). Such a stance ignores that property rights are “interdependent” and that the use of one's property in a manner inconsistent with a neighboring use can give rise to land-use conflict (Freyfogle).

It is disheartening to see how far we the property rights movement has deviated the focus away from the common good in terms of property use. The movement has have

lost sight of the fact that, while land use regulations may restrict the ability to use our property in any conceivable manner, they likewise restrict neighboring property owners from using their property in a manner that may be offensive or in a manner that may diminish property value. In short, it has been forgotten that, while land-use regulations may restrict us in the use of our property, they also protect us from conflicting uses. While it may be argued land use regulations diminish property value, they also protect that value. In Oregon, this protection has resulted in the preservation of farm and forestland for farm and forest uses from encroachment of residential, industrial or commercial uses.

The dichotomy that a given regulation can both benefit and burden a property is referred to as “specific reciprocity” (Cordes). As explained by Cordes, specific reciprocity occurs in zoning in that an individual landowner may be burdened by restrictions placed on his or her land, but the landowner also receives some benefits from neighboring property having similar burdens. “General reciprocity” represents the “reciprocal burdens and benefits of regulatory life” (Cordes). Thus, while one regulation may diminish an individual’s property value, that individual may benefit from other regulations.

An example of the struggle society is having in grasping both the overall benefits and burdens of government action until they are directly affected was, relayed by Alwin Turiel, former planning director for Klamath County, Oregon. Apparently, there was a citizen in Klamath County who appeared at almost every Measure 37 hearing to testify in favor of letting the claimant do as they wished with their property. Much to the surprise of the County Commissioners, this citizen appeared in one case to testify in opposition of

granting the waiver. Why? Because this claimant was his neighbor. This epitomizes the problem with Measure 37 and its progeny – it's ok to let people use their property as they see fit *unless* that property is next to us, in which case, the use of it should be restricted. The irony of this example is that such protection is the purpose of land-use regulation: to protect the public welfare. In contrast, property rights laws neglect the public welfare in favor of the individual. The property rights movement focuses solely on personal gain and rarely considers individual actions in terms of the public realm.

Inflexibility of the Oregon System

While the Oregon land use system is a good model, it is 35 years old. The passage of time has diminished the memory of why the system was adopted. In addition, the system has become increasingly rigid.

Until recently, there has not been a comprehensive review of the system and changes have made it more cumbersome. The system originated with simple concepts – preserve valuable land, including farm and forest land, and create urban growth boundaries for compact urban forms. Despite these simple concepts, the system has grown to contain voluminous statutes and regulations. The result is it is not easily navigable by a layperson. Applications filed under the system often require the assistance of planners and lawyers, as well as time and money.

In addition to changes in the system causing it to become more rigid, attempting to govern every foreseeable threat to the land use system, changes have not taken into consideration changes in methods of farming. One example of changes in agricultural methods that has received public discussion concerns wineries. Such an endeavor may

not necessarily require 80-acres.¹ Regardless of the size of the vineyard, the proprietor is forced to cultivate the vineyard for at least three years until he or she will be permitted to build a farm dwelling. This may have a chilling effect on a person making the large investment required.²

As outlined below in the history of the Oregon land-use system below, the laws and regulations adopted since 1973 have, for the most part, placed additional restrictions on the use of farm and forest land. This evolution may help explain the rise of the property rights movement in Oregon.

Oregon's Land Use Regulation History

As outline below, Oregon's land use system was born out of the recognized need to preserve valuable resource land, which had been threatened by urban sprawl and growth. In addition to the loss of resource land, the uncontrolled growth gave rise to concerns over the ability to efficiently provide public services and infrastructure.

Senate Bill 100 (SB 100), adopted in 1971, was the predominant measure to address the future of urban growth and resource protection. SB 100 and the subsequent Statewide Planning Goals were preceded by extraordinary public outreach efforts throughout the state.

¹ In his article, RETIREMENT PLAN COMES FROM NEW LOOK AT OLD FARM. FARMER DEVELOPS A DIFFERENT TAKE ON RETIREMENT, The Capital Press (January 11, 2007), Mitch Lies reports on a farmer in The Dalles who, after realizing that hay farming was not profitable and, wanting to retire on his farm, started to lease and/or sell his land for more profitable crops. The idea came when the farmer learned of a vintner looking for 40 acres in The Dalles. With regard to the 160-acre lot restrictions, the farmer commented that "Oregon's zoning laws do not accommodate agricultural transition to higher-value land . . . When low-value agricultural land is not sustainable, people have to be able to transfer to high-value agriculture."

² The farmer in Lies' article had to dig a well 220 feet deep, build roads, construct an irrigation system to pump water from the bottom of the property at an 850 elevation, to the top at 1,100 feet. Additional improvements include running power lines to the new portions of the property, and constructing a 4 million gallon reservoir.

Subsequent amendments to the land use system include restrictions on the ability to construct farm and forest dwellings, including increasing minimum lot sizes, adopting income tests and limiting the development of nonfarm dwellings. As outlined below, these restrictions have led to numerous challenges to the land use system both within the legislature and through ballot measures, including Ballot Measures 7, 37 and 49.

Senate Bill 100 – Oregon’s Land Use System is Born³

Conditions Leading to Senate Bill 100.

The movement towards the adoption of the Oregon land use system began in the 1960s. Nationally, urban sprawl was consuming land seventy percent (70%) faster than population growth (Nelson). Sprawl in Oregon caused threats to:

- The local agricultural economy by way of development of farmland and increased taxes to neighboring farmland, making it difficult for those farms to stay in business (Mid Willamette Council of Governments);
- Farm uses by way of negative influence of urban development on agricultural productivity, including reduced hours for operation of farm equipment, constraints on the use of certain fertilizers or pesticides and inability to expand farm operations (Nelson);

During the 1960s and 1970s, Oregon’s population was growing at a rate roughly twice the national average, making it the sixth fastest growing state (Nelson). An estimated 66 percent of Oregon’s population settled in the Willamette Valley, which was the center of growth for Oregon (Kvarsten 1974; Nelson 1983). It is claimed that the Willamette Valley lost 500,000 acres of farmland to development between 1955 and 1970 (biodiversitypartners.org/reports/Wiley/Overview.shtm). Based on the growth rate during the 1960s and 1970s, it was estimated that urban land in the Willamette Valley would increase by 75 percent (or 250,000 acres) between 1966 and 2000, with another

³ This section is adapted from Roland, Shawn, Jeannine Rustad, URBAN CONTAINMENT: A COMPARATIVE STUDY OF PORTLAND, SEATTLE, AND VANCOUVER B.C. (March, 2006).

370,000 acres devoted to uses such as garbage sites, airports, roads, parks and water storage (Nelson).

In addition to this fast growth, Oregon was experiencing growth patterns with a trend of “increasing fragmentation and [scattering] i.e. a constant division and re-division of the properties on the city’s periphery and beyond” (Kvarsten). Pressures in the suburbs resulted in the spread of development into farmland (Kvarsten). Coupled with this spread of development into farmland, there was inefficient use of urban land (Mid Willamette Council of Governments). This inefficient use of land gave rise to the additional concern of the efficient provision of public services, such as sewer and water.

In 1966, communities in the Portland region joined together to consider the future of urban growth. As outlined below, this led to the adoption of Senate Bill 10 (SB10) and later, Senate Bill 100 (SB100).

Senate Bill 10

Senate Bill 10 was the first attempt at establishing a state-wide land use program in Oregon. Drafted in 1967 and adopted in 1969, SB10 required that every locality adopt a comprehensive plan and zoning regulations by December 31, 1971. Although SB10 did include 10 goals to guide localities in their planning, it was weak in that it: (1) did not specify planning expectations; (2) lacked an enforcement mechanism; (3) lacked technical assistance; and (4) failed to include criteria for evaluating or coordinating local plans (<http://uts.cc.utexas.edu/~bobprp/statesprawl/Cases/Metro%20Casestudy%2004-22-03.doc>). By the 1971 deadline for adoption of comprehensive plans, few localities had complied. At the same time, population in Oregon continued to grow, with a five

percent (5%) increase between 1970 and 1972, most of which was concentrated in the Willamette Valley (biodiversitypartners.org/reports/Wiley/Overview.shtml).

As a result of the failure of SB10 and continued, uncontrolled growth, then Governor Tom McCall proposed planning program that would: (1) contain urbanization; (2) protect open spaces; and (3) control land uses throughout the Willamette Valley under state guidelines (Nelson). Advocates for delineating growth boundaries pointed to the following advantages:

- The ability to “shape land use and zoning policies based on carefully developed and pre-determined concept of the regional urban-rural structure”;
- Ability to structure city services based on a known geographic area and without threat of such services being undermined by growth outside the urban areas;
- Certainty for property owners with regard to urban growth;
- “Utility extensions into unserved areas could be programmed and phased so as to correlate population densities with new utility construction”;
- Government planning efforts could be “channeled toward developing a community environment of exceptional quality” (Kvarsten).

With regard to future needs of expansion, the following three alternatives were recommended:

1. Redevelopment into higher densities of areas within the community;
2. Development of a new community on a site selected on the basis of soils, geology, travel patterns and economic considerations; and
3. Review, at that time, of the boundary to possible expansion in light of contemporary changes and trends (Kvarsten).

Senate Bill 100

In his last term in office and unsatisfied with the results of SB10, Governor McCall created “Project Foresight”. Project Foresight was initiated to explore whether federal, state and local governments could “work together to meet the challenge of growth and development in the Willamette Valley” (McCall). Specifically, Project

Foresight was Governor McCall's yearlong crusade to educate Oregonians and convince them of the need for a comprehensive, state-guided approach to protect its treasured farms and forests (www.biodiversitypartners.org/reports/Wiley/Overview.shtml). The task force examined different scenarios of growth and development in the Willamette Valley – one based on “sound planning” and compact growth patterns, the other projecting a continuation of the current pattern of sprawl (biodiversitypartners.org/reports/Wiley/Overview.shtml). The project was an incredible undertaking, with its resulting slide show being shown in about 250 different locations before approximately 18,000 people (Meyers), ultimately culminating in the adoption of SB100, described by Governor Tom McCall as “the single most important land use bill ever considered by our lawmakers” (McCall).

Governance Under SB100

As a result of SB100, three new agencies were formed: (1) the Land Conservation and Development Commission (LCDC), charged with oversight of compliance of local planning with statewide goals; (2) Department of Land Conservation and Development (DLCD), whose staff would support the LCDC; and (3) the Land Use Board of Appeals (LUBA), which was created in 1979 to facilitate the prompt resolution of land disputes and provide consistent interpretation of Oregon land use laws.

In December 1974, after a year and 80 public hearings around the state, LCDC adopted the statewide planning goals, which clarified the 10 goals included in SB10 and added 4 new goals. Goal 15, regarding Willamette Valley River Greenway, was added in December 1975, and Goals 16 through 19, focusing on coastal zone issues, were added in

December 1976. Most of the Goals are accompanied by “guidelines,” which are suggestions about how a goal may be applied.

Urban containment policy can be found in Statewide Goal 14, the purpose of which is to

provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities (www.oregon.gov/LCD/docs/goals/goal14.pdf).⁴

Goal 14 requires the establishment of urban growth boundaries by localities “to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land” (*Id.*). Rural land is defined as “(a) resource land (farm and forest), or (b) sparsely settled areas” (Eco Northwest 1991). In short, the purpose of Goal 14 is to concentrate growth in urban areas (Eco Northwest 1991).

Also central to the land use system are Goals 3 and 4, the purposes of which are to preserve and maintain agricultural and forest lands, respectively.

Farm and Forest Regulations Since 1973

In 1983, the Marginal Lands Act (ORS 215.705) established a means by which counties could designate “marginal lands” and relax criteria for dwellings on parcels created before July 1, 1983. Only Washington and Lane counties opted to designate marginal lands. Since then, regulations have further restricted the development of resource land, including:

- **1993** - House Bill 3661 changed the requirements to the siting of farm and forest dwellings. With respect to farm land, the legislature gave owners of less productive land the opportunity to build a dwelling on their land while

⁴ This language reflects the new Goal 14, amended on April 28, 2005, effective April 28, 2006. The original purpose of old Goal 14 was simply “to provide for an orderly and efficient transition from rural to urban land use” (<http://www.oregon.gov/LCD/docs/goals/oldgoal14.pdf>).

limiting opportunities to build dwellings on more productive land (ORS 215.700). As to forest land, the bill established the types of dwellings allowed on forest land and the minimum lot sizes for forest zones.

- **1994** - LCDC adopted a rule interpreting the statutory standard that a farm dwelling be “customarily provided in conjunction with farm use” (OAR 660-033-0130). The rule required \$80,000 gross farm income for two of the last three years, or three of the last five years, before a dwelling could be built on “high value” land in conjunction with that farm use (OAR 660-033-0130(24)(b)(B)). A \$40,000 test was required for non-high-value agricultural land (OAR 660-033-0130(24)(b)(A)(i)).
- **2001** – HB 3326 was made nonfarm dwellings on EFU lands difficult to obtain (Girshkin). HB 3326 limited the number of parcels eligible to be divided for nonfarm dwellings and established narrow, objective standards for the division of any nonfarm parcels determined to be unsuitable for farm use and forest use (Girshkin). As a result, land could no longer be divided to create parcels for nonfarm dwellings.

Senate Bill 101

The success of urban containment is not solely attributable to SB100 but, rather, has been aided by Senate Bill 101. SB101 was adopted one month after SB100, in recognition of the need to account for restrictions and loss of use caused by farm or forest zoning (Richmond & Houchen). SB101 was intended to “set forth legislative policy that zoning limitations on agricultural lands constituted the rationale and justification for property tax reductions (Richmond & Houchen). As provided in ORS 215.243

Exclusive farm use zoning, as provided by law, substantially limits alternatives to the use of rural lands and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zone.

In accordance with SB101, the purpose of planning is “to contain urban development and protect farmland” (sustainable.state.fl.us/fdi/fsc/news/world/0008/benner.htm).

Although the policy was not based upon the notion of sustainability, “the effect of the policy is to sustain the farmland base, to sustain Oregon’s urban centers, and to keep Oregon’s network of public infrastructure affordable and sustainable over time” (*Id.*).

As a result of SB100 and SB101, local governments are required to inventory farm and forest lands within their jurisdictions and zone them accordingly (Shriver). In tax year 2003-04, special assessment of farm land applied to 15.6 million acres statewide (Richmond & Houchen).

Challenges to the Oregon Land Use System

Ballot measures to abolish SB100 were introduced and defeated in 1976, 1978 and 1982. The 1976 challenge would have repealed SB100 in its entirety, while the 1978 proposal would have repealed the statewide goals and required the establishment of new goals, as well as compensation for adversely affected landowners (Shriver). The 1982 challenge was based on the belief of many that the recession of the time was a result of planning and would have shifted much of the authority of the land use system from the state to local governments (Shriver). In 1995, the Legislature considered more than 70 bills to weaken SB 100, most of which were defeated and the rest of which were vetoed by Governor John Kitzhaber (oregon.gov/LCD/history.shtml#Chronology_1969_to_Present). Additional attempts to weaken SB100 were defeated in 1997.

The 21st century has brought a renewed call for fairness in the Oregon land use system. While the first ballot measure seeking fairness in Oregon's land use system was introduced in 2000, property rights advocates have asserted that when SB100 was passed, it was with the understanding that the state would develop a program to compensate landowners whose property values had been diminished as a result of new regulations (Shriver). Support of this claim can be found in Senate Bill 849, introduced by Governor McCall in 1973. The Bill, entitled the Land Value Adjustment Act of 1973, "sought to separate social and private interests in land and use the distinction to compensate private

landowners” (Shriver). However, the bill lacked a funding mechanism and, as a result, language was added to SB100 forming a committee to study and make recommendations about a compensation program (Shriver). The legislature did not adopt any of the committee’s recommendations (Shriver).

In 2000, Ballot Measure 7, the first ballot measure requiring payment for diminished value to land based on past (and future) land use regulations was passed by a margin of 54 percent to 46 percent. Measure 7 made two unrelated amendments to the state’s constitution: (1) relating to payment of compensation; and (2) restraining the freedom of expression of owners of pornography shops (Shriver). Because these changes were not “closely related”⁵ the measure was overturned by the Oregon Supreme Court (Shriver).

Measure 7 was a warning to policy makers that Oregonians wanted fairness added to the land-use system and that there was increasing concern for private property rights. Unfortunately, policy makers missed the opportunity to balance the need to protect vital, natural resources and private property rights by allocating the cost of such preservation equitably among the citizens of Oregon, rather than placing the entire burden on the few affected landowners. Compensation proposals were considered in 2001 and 2003, but the legislature could not agree as to how to fund such programs. Consequently, nothing was enacted (*Id.*). As a result of the legislature’s failure of action, in 2004, Oregonians in Action⁶ proposed Measure 37, which was overwhelmingly approved by the voters of Oregon by 61 percent to 39 percent. Measure 37 became effective December 2, 2004,

⁵ The Oregon constitution requires that “substantive” and “not closely related” amendments to be voted on separately.

⁶ Oregonian’s In Action’s stated purpose is as a “non profit lobbying organization that leads the fight for land-use regulatory reform and protection for private property rights” (<http://oia.org/>).

requiring state and local governments to either compensate or waive land use regulations that reduce a property's fair market value" (*Id.*). This benefit is only provided for "land owners or relatives of land owners who purchased a property prior to the enactment of a land use regulation" (*Id.*). The initial challenge to Measure 37 was unsuccessful, resulting in the Oregon Supreme Court upholding Measure 37.

Following the adoption of Measure 37, six other states proposed property rights laws. The following section analyzes the valuation methods under Oregon's Measures 37 and 49, as well as adopted legislation in Florida, Texas and Arizona. An analysis of proposed legislation in California, Washington, Idaho, Montana and Nevada is also provided.

Existing and Proposed Land use Regulations

The Importance of Accurate Valuation

As described in the following analysis of Measures 37 and 49, the state, as well as most counties, made little to no effort to calculate (or require proof of) an accurate loss in value. Under Measure 37, such efforts would have been pointless, as there was no money allocated for payment, leaving waivers of offending regulations as the only relief.⁷ A waiver was required whether the loss was \$1 or \$1 million. Measure 49, on the other hand, only requires valuation for claims between 4 and 10 homes.

Both Measure 37 and 49 favor long-time landowners in that one must have owned his or her property prior to the adoption of the land use regulation in question. In applying a property rights law retroactively, valuation is one of the keys to bringing fairness (in the form of accurate and just compensation) to property owners, greater

⁷ To date, only the city of Prineville has offered to pay a claim (Scarborough King; Sullivan)).

fairness to adjoining property owners, whose current right to peaceful enjoyment of their property (or worse)⁸ is at stake, and the public good.⁹ Finding a fair approach to valuation will serve the dual purposes of protecting property rights *and* protecting resource land and planning for the future.

Valuation Under Measure 37 and 49

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations must have “the effect of reducing the fair market value of the property, or any interest therein.” Section (2) of Measure 37 provides the only statement regarding calculating value:

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

As discussed in the following section, Measure 37 used the monopoly method of valuation, resulting in windfalls to property claimants. Measure 49 sought to avoid such windfalls while balancing potential hardships caused by land use regulations.

Under Measure 49, a claimant¹⁰ has three options: (1) elect the “fast track” option, which allows up to three houses (or lots), including existing houses, without showing any loss of value; (2) try for four to 10 homes by showing loss in value through appraisals; or (3) show a vested right in development under a Measure 37 claim. Two appraisals for each regulation alleged to have reduced market value are required for the

⁸ Unlike Measure 37, under which the only restriction for development was health of safety, Measure 49 limits development in areas with restricted groundwater (OAR 660-041-0140), thus protecting surrounding properties from further depletion of available water and, as a result, property values.

⁹ As pointed out by Ed Sullivan, Esquire, if an accurate valuation of loss in claims can be established, “it may be that local governments can afford to take a more strategic approach to Measure 37 and pay at least some of the monetary claims” (Sullivan).

¹⁰ A claimant must have filed a Measure 37 claim with the State prior to December 6, 2007.

second option – one showing the fair market value one year before the enactment of the land use regulation that was the basis for the claim and the fair market value of the property one year after the enactment. Recognizing the cost that requiring appraisals will impose on claimants, Measure 49 allows up to \$5,000 to be added to the calculation of the reduction in fair market value (ORS 197.424(7)).

Survey of Planning Directors

In December 2006, a survey was distributed to the 36 Oregon County Planning Directors seeking input on methods employed to measure valuation, including any evidence required to substantiate a claim of loss and methods used to verify or refute such claims; whether value added by government action was taken into consideration; and seeking input on methods that should be used for the valuations of losses. Planning directors from six counties responded, one of who had not received any claims. Of those counties that had received claims, three did not offer any rebutting evidence and the other two held hearings before the Board of Commissioners. None of the counties considered value-added regulations. The most that was required for evidence was an analysis from a real estate broker (or appraiser, although this was not required) or a competitive market analysis.

For recommendations on valuation, one respondent noted that coming up with an accurate valuation was not necessary, as a loss in the amount of as little as \$1 entitled the claimant to relief. Other respondents recommended valuing the loss based on purchase price and comparing loss at the time of adoption, rather than valuing the property with the removal of the offending regulations. The appraisal method was recommended, as well as taking into consideration the amount of relief granted by special taxation relief.

A Look at Other States

Florida, Texas, Arizona, Louisiana and Mississippi have property rights laws. Florida, Texas and Arizona's laws are centered around property rights, while Louisiana and Mississippi's laws are focused on the right to farm and the effects of regulations or government action on agriculture and/or forestry. In 2006, California, Washington and Idaho all rejected ballot proposals for property rights laws. Ballot measures in Montana and Nevada were invalidated by the courts. A review of these laws is useful to determine if they offer any insight as to what constitutes a fair and balanced approach to valuation.

What is learned from a review of the following laws and proposals is that recent efforts to pass property rights laws made little effort to find a fair and balanced approach to valuation. Recent proposals contained little, if anything, in the way of requiring proof of loss.

In contrast, as discussed below statutes adopted by Florida, Texas, Louisiana and Mississippi illustrate important considerations for property rights regulations. Such considerations include short statute of limitations, prospective application, the use of thresholds and flexibility in methods of granting compensation.

Approved Legislation

The Florida and Texas property rights laws predate the property rights movement in Oregon. The Florida and Texas statutes contain features that should be considered in drafting a new property rights law. For example, laws in both states apply retroactively only and contain short statutes of limitations for filing a claim. Florida requires an appraisal in support of a claim of loss of value. As defined in the Florida statute, a loss in value can result from restricting either investment backed-expectations or vested rights.

The Florida statute offers a wide range of relief that the government may offer a claimant.

The Texas statute contains a 25 percent threshold for reduction in value caused by government action.

Florida

Florida enacted the Bert J. Harris Jr. Private Property Rights Protect Act (Fla. Stat. Ann. § 70.001 *et seq.*) and the Florida Land Use and Environmental Dispute Resolution Act (Fla. Stat. Ann. §§ 70.51 *et seq.*). Neither of these acts is retroactive but, rather, applies only prospectively from the effective dates of the acts.

The Harris Act

The Harris Act creates a cause of action for landowners who feel that a government action that affects real property¹¹ has “***inordinately burdened*** an existing use of real property or a vested right¹² to a specific use of real property” (Fla. Stat. Ann § 70.001(2)). The term “inordinately burdened” means

... an action of one or more governmental entities has directly restricted or limited the use of real property *such that the property owner is permanently unable to attain the reasonable, investment-backed expectation* for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, *or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public,* which in fairness should be borne by the public at large. The terms “inordinate burden” or “inordinately burdened” do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section (Fla. Stat. Ann § 70.001(3)(e)).

¹¹ Such action includes action on an application or permit (Fla. Stat. Ann § 70.001(3)(d)).

¹²

A “vested right” is “to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of

[Florida] (Fla. Stat. Ann § 70.001(3)(a)). The term “existing use” is defined as

. . . an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, non-speculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property (Fla. Stat. Ann § 70.001(3)(b)).

Claims must be brought within one year of the first application of the regulation in question (Fla. Stat. Ann. § 70.001(11)) and must include a “bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property” (Fla. Stat. Ann § 70.001(4)(a)). The government entity has a wide range of relief it may offer the claimant:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of developmental rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.
11. No changes to the action of the governmental entity (Fla. Stat. Ann. § 70.001(4)I).

The claimant may accept the government's proposal or, in the alternative, reject the offer and file a cause of action in circuit court.

The Dispute Resolution Act

The Dispute Resolution Act applies to development orders or enforcement actions. The standard giving rise to a cause of action in Florida's Dispute Resolution Act is whether the development order or enforcement action "*is unreasonable or unfairly burdens* the use of the owner's real property" (Fla. Stat. Ann. 70.51(3)). An owner must file a claim with the government entity within 30 days after receipt of the order or notice. Given the more relaxed standard of harm, the property owner need not submit an appraisal. The claim must include only:

- (a) A brief statement of the owner's proposed use of the property.
- (b) A summary of the development order or description of the enforcement action. A copy of the development order or the documentation of an enforcement action at issue must be attached to the request.
- (c) A brief statement of the impact of the development order or enforcement action on the ability of the owner to achieve the proposed use of the property.
- (d) A certificate of service showing the parties, including the governmental entity, served. (Fla. Stat. Ann. § 70.51(6)).

The claim is resolved by a special magistrate, who is selected based on agreement by both the property owner and government.

Texas

The Texas Private Real Property Preservation Act (Tex. Gov't Code Ann. §§2007.001 *et seq.*)(the "Texas Act") took effect on January 1, 1996. The act gives rise to a cause of action for a "taking."¹³ A taking can be a taking as provided by the Fifth

¹³ The full definition of a "taking" giving rise to a cause of action under the Texas act is:

and Fourteenth Amendments of the constitution (or provisions of the Texas Constitution). A taking can also be a government action that affects private real property resulting in a reduction in at least 25 percent of the market value. The reduction is determined by comparing the market value of the property as if the government action is not in effect and the market value of the property determined as if the governmental action is in effect. Under either alternative, the taking may be either partial or in whole, temporary or permanent.

Unlike Measure 37, which only exempts regulations that prohibit nuisances, relate to public health or safety, comply with federal law or relate to the selling of pornography or nude dancing, the Texas statute exempts fourteen types of government action (Tex. Gov't Code Ann. § 2007.003(b)(1)-(14)). The most relevant to Oregon of these exceptions are:

(10) a rule or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;

(11) an action taken by a political subdivision:

(A) to regulate construction in an area designated under law as a floodplain;

(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or

(B) a governmental action that:

(i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and

(ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect (Tex. Gov't Code Ann. §2007.001((5)).

- (B) to regulate on-site sewage facilities;
- (C) under the political subdivisions' statutory authority to prevent waste or protect rights of owners of interest in groundwater; or
- (D) to prevent subsidence;
- (E) actions that enforce or implement the Texas Natural Resource Code (Tex. Gov't Code Ann. § 2007.003(d)).

As with the Florida statutes, the Texas act does not apply retroactively but, rather, applies only to regulations or actions taken after the effective date of the Texas Act (Tex. Gov't Code Ann. § 2007.003(d)). The statute of limitations for filing a claim is 180 days “after the date the private real property owner knew or should have known that the governmental action restricted or limited the owner’s right in the private real property” (Tex. Gov't Code Ann. § 2007.021(b)).

Arizona

Arizona was the only state to pass a private property right referendum in 2006 (Ariz. Code §§ 9-500.12 *et seq.* and 11.810 *et seq.*). The Arizona statute gives rise to a cause of action against municipal or counties for the “adoption or amendment of a zoning regulation” that constitutes a taking. The standard for takings under the Arizona code is that set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). For a government action to rise to the level of a compensable regulatory taking under the *Lucas* standard, it must eliminate “all viable economic use.”

A property owner has 30 days from the date of the final action in which to file a claim. The government has the burden of establishing

An essential nexus between the dedication or exaction and a legitimate governmental interest and that the proposed dedication, exaction or zoning regulation is roughly proportional to the impact of the proposed use, improvement or development or, in the case of a zoning regulation, that the zoning regulation does not create a taking of property in violation of [the *Lucas* standard].

Right to Farm Legislation – Louisiana and Mississippi

Both Louisiana and Mississippi have adopted right to farm laws that include protection against government actions that reduce the value of agricultural land and/or activities. While these statutes do not shed much light on an appropriate method of valuation, they do offer examples of the wide variety of thresholds for loss of value, with the Louisiana containing a 20 percent threshold and Mississippi a 40 percent threshold.

Louisiana

Louisiana's Right to Farm Law was adopted in 1983 (La. R.S. § 3:3601 *et seq.*). The law protects farmland and activities from private nuisance suits, as well as ordinances that would declare agricultural operations operated in accordance with generally accepted agricultural practices a nuisance. The law also protects agricultural operations, once annexed, from municipal zoning laws (La. R.S. § 3:3607).

In order to minimize government impact on agricultural property, the law requires avoidance of “diminution in value of private agricultural property which is used in agricultural production or which may potentially be used in agricultural production” (La. R.S. § 3:3608). “Diminution in value” is defined as

an existent reduction of twenty percent or more of the fair market value or the economically viable use of, as determined by a qualified appraisal expert, the affected portion of any parcel of private agricultural property or the property rights thereto for agricultural purposes, as a consequence of any regulation, rule, policy, or guideline promulgated for or by any governmental entity (La. R.S. § 3:3602(11)).

Prior to adopting any new regulation that may impact the right to farm, the governmental entity is required to “prepare a written assessment of any proposed governmental action prior to taking any proposed action that will likely result in a

diminution in value of private agricultural property” (La. R.S. § 3:3609(A)). No direct cause of action against the government is created by the Louisiana statute.

Mississippi

Mississippi adopted the “Mississippi Agricultural and Forestry Activity Act” in 1994 (Miss. Code §§ 49-33-1 *et seq.*). One purpose of the act is to provide a mechanism for compensation to owners of forest and agricultural land if the state severely limits forestry or agricultural activities (Miss. Code § 49-33-3).

Inverse condemnation is defined in the act as “. . . any action by the State of Mississippi that prohibits or severely limits the right of an owner to conduct forestry or agricultural activities on forest or agricultural land” (Miss Code § 49-33-7(c)).

“Prohibits or severely limits” means

. . . to reduce the fair market value of forest or agricultural land (or any part or parcel thereof) or timber, wood or forest products including nongame species (or any part or parcel thereof) or personal property rights associated with conducting forestry or agricultural activities on the forest or agricultural land by more than forty percent (40%) of their value before the action (Miss Code § 49-33-7(h)).

Unlike the Louisiana statute, the Mississippi statute does grant a property owner a cause of action against the governing entity for loss of value (Miss Code § 49-33-9). The statute of limitations for filing a claim is one year from the adoption of the regulation in question (Miss Code § 11-46-1(3)).

Rejected Legislation

The 2006 elections saw the introduction of property rights legislation in Arizona, California, Washington and Idaho. With the exception of Arizona, discussed above, all proposals were rejected. Courts rejected the Montana and Nevada proposals. As with

Measure 37, these proposals failed to offer any guidance as to how to measure loss of value.

Unfortunately, these proposed ballot measure do not offer any guidance as to what makes a good property rights regulation. To the contrary, they all favored the individual property owner at the expense of the common good. For example, California's Proposition 90 was aimed at restricting the government's ability to regulate private property for purposes unrelated to public health and safety. Washington's Initiative 933 would have applied to both real and private property. Much like Measure 37, they did not require any proof of loss.

California

California Proposition 90 – “Protect Our Homes Act” – was introduced as a proposed state constitutional amendment and would have applied prospectively only. The portion of the proposal that deals with non-traditional takings was aimed at restricting the government's ability to regulate private property “for purposes unrelated to public health and safety” if the regulations reduce the value of private property. The proposed amendment introduced the definition of “damage” to private property in the takings provision and would have required just compensation for any diminution of fair market value for property damaged. “Damage” to private property was defined to include

. . . government actions that result in substantial economic loss to private property. Examples of substantial economic loss include, but are not limited to, the down zoning of private property, the elimination of any access to private property, and limitations on the use of private air space.

“Government action” was defined as “any statute, charter provision, ordinance, resolution, law, rule or regulation.”

“Just compensation” was defined as

. . . that sum of money necessary to place the property owner in the same position monetarily, without any governmental offsets, as if the property had never been taken. ‘Just compensation’ shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred.

No guidelines were provided as to how the diminution in value was to be measured in non-eminent domain cases.

Washington

Washington Initiative 933, unlike Measure 37, would have applied to both real and personal property. Initiative 933 defined “compensation” as

. . . remuneration equal to the amount the fair market value of the affected property has been decreased by the application or enforcement of the ordinance, regulation, or rule. To the extent any action requires any portion of property to be left in its natural state or without beneficial use by its owner, “compensation” means the fair market value of that portion of property required to be left in its natural state or without beneficial use. “Compensation” also includes any costs and attorneys’ fees reasonably incurred by the property owner in seeking to enforce this act.

As with Measure 37, Initiative 933 provided no method of measuring loss of value.

Initiative 933 would have applied both prospectively and retroactively to at least 1996 (the year Washington’s statewide land use system was adopted).

Idaho

Idaho’s Proposition 2 included a pay-or-waive clause requiring the government to pay “just compensation” if the enactment or enforcement of any land use law limited or prohibited the owner’s ability to use, possess, sell, or divide private real property in a manner that reduced the fair market value of the property. “Just compensation” was defined as being “equal to the reduction in the fair market value of the property resulting

from enactment or enforcement of the land use law as of the date of enactment of the land use law.” No guidance was provided as to how to measure just compensation.

Montana

As with California’s Proposition 90, Montana’s Initiative No. 154 introduced the concept of “damage” to private property by way of land use regulations. Initiative No. 154 defined damages as those that “occur when government regulations enacted after acquisition of an ownership interest in real property result in diminished value or economic loss to the private property subject to the government regulation.” Just compensation in these cases was defined as “the depreciation in the current fair market value, plus costs, interest and attorney fees as well as diminished value resulting from costs or losses incurred with respect to relocation or closing of a business.”

Initiative No. 154, which was to apply prospectively, did not provide any guidance as to how depreciation in the fair value of an affected property should be measured.

Initiative No. 154 was struck down by the Montana courts and, as a result, not put on the ballot, because signature-gatherers engaged in what the judge termed a “pervasive and general pattern and practice of deceit, fraud and procedural non-compliance” (www.sightline.org/research/sprawl/res_pubs/property-fairness/6-initiatives).

Nevada

The Nevada Property Owners’ Bill of Rights, a proposed constitutional amendment, would have required the payment of “just compensation” for government actions that resulted in “substantial economic loss to private property.” Examples of

“substantial economic loss” provided in the Bill included “the down zoning of private property, the elimination of any access to private property and the limiting of use of private air space.” No method of measuring “substantial economic loss” was provided.

The proposed Property Owners’ Bill of Rights, sponsored by the People’s Initiative to Stop the Taking of Our Land’s, was partially invalidated by the Nevada Supreme Court because it violated Nevada’s rule that initiatives may contain only a single subject. The Bill also included a *Kelo*-style eminent domain provision.

Analysis of Valuation Methods

To date, no legislation has offered a comprehensive method of valuation. In this section, the monopoly method, economist approach, appraisal method and Measure 49 will be evaluated using the criteria of clarity, cost, accuracy and fairness and implementation. The goal is to determine a method that

- Is easily understood by lay people and officials, alike;
- Does not impose high costs in implementing on either claimants or governments;
- Accurately measures the loss in value, so as to avoid windfalls or excessive burdens on individual land owners; and
- Is not overly cumbersome to implement.

As illustrated below, the monopoly method is the easiest to understand and implement in terms of administration and cost. However, the end result is often a windfall profit to the claimant, in that it measures the value of the claimant’s land without the regulation, as opposed to the reduction in value caused by the regulation. The windfall results from the fact that neighboring properties remain subject to the regulation, making the claimant’s property more desirable. While the economist approach would yield the most accurate measurements of loss in value, it is the most difficult to

comprehend and to implement. Additionally, as illustrated in Table 2, different price indices used to calculate the loss in value can result in a wide range of values. The appraisal method is relatively easy to comprehend and implement, as well as resulting in fairly accurate measurements of loss in value, especially if applied prospectively.

Measure 49 was the compromise accepted by Oregonians after the potential impact of Measure 37 became apparent. While it does not attempt to measure loss in value for claims for the construction of up to three homes, it does achieve a better balance of interests by allowing the construction of up to three homes without proof of loss and four to 10 homes with proof of loss through appraisals. Measure 49 also limits construction in ground water restricted areas and on high value farmland, taking into consideration neighboring property owners and the common good.

Evaluation Criteria

As set forth in the problem statement, a “fair and balanced” method of evaluation must take into consideration the rights of the individual property owner, neighboring property owners, the public good and government interests and not overly burden one over another. To assist in arriving at a fair valuation method, the following criteria will be used to analyze various valuation methods that have been proposed:

1. Clarity
 - Is the standard easily understood by planners and lay-persons?
2. Cost
 - What will be the cost to claimants in meeting the standard – is it reasonable?
 - What will be the cost to the government in implementing the standard (i.e., it may be cost-prohibitive to require governments to provide an appraisal for each claim filed)?
3. Fairness and accuracy

- Does the standard create an undue burden on a claimant?
 - Does the standard create a windfall for the claimant?
 - Will the result place undue burden on neighboring property owners or the general public? For example, will the resulting relief, if in the form of a waiver, deplete the water table risking availability for surrounding uses?
 - Will the standard provide compensation equal to or close to the actual loss?
4. Implementation
- How easily can the standard be implemented? What are the demands for time and resources?

The following is an analysis, using the above criteria, of methods of valuation that have been suggested by scholars or implemented. Table 1 summarizes the analysis.

While the matrix may indicate that the monopoly method is an acceptable approach, as set forth fully in the following section, this method is, in fact, unacceptable, due to the potentially large windfalls to claimants, as well as total disregard for neighboring property owners and the general good.

Table 1: Valuation Analysis Matrix

Method	Clarity	Cost	Accuracy & Fairness	Implementation
Monopoly	+	+	-	+
Economists Approach	-	-	+	0
Appraisal	+	0	+	+
Ballot Measure 49	+	0	0	+

Exemption or Monopoly Value Compensation Under Measure 37

The exemption or monopoly value compensation was the method used by DLCD, as well as many counties, in analyzing Measure 37 claims. Under this method, the property owner was compensated in the amount of the current fair market value of his or her property without the challenged land use regulation(s) less the current market value

with the regulation(s). The reason this method has been referred to as the “monopoly” value compensation is the fact that removing the regulations from one property but remaining in effect on surrounding properties restricts supply to the claimant’s property. This results in the revival of development rights, and the transfer of those rights to a claimant’s property unjustly enriches the claimant. As explained by the petitioners in *Hood River Valley Residents Committee v. State of Oregon Department of Administrative Services*, Case No. 06C-17267, DLCD calculated loss in value by looking at the “increase in value created by land use law, as opposed to measuring the reduction in value caused by the those regulations.”

It has been explained that:

Without that restriction on supply, demand for residential development would associate with thousands of acres of farm land surrounding [the claimant’s property]. With that restriction on supply, demand for residential development is concentrated on claimant’s suddenly “scarce” property (Richmond & Houchen).

An article in The New Yorker comments that

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

For an example of how removing zoning from all properties would alter supply and demand, one need only look to the past. As explained in the *Measure 37 Report and Recommendation* to the Joint Special Committee on Land Use Fairness,

Thousands of already approved, ready-to-sell rural lots, created in the early 1900s, in “fruit tree” subdivision in the North Willamette Valley, and thousands of “Sagebrush subdivision” lots created in the 1950s and 1960s in Central and Eastern Oregon, remained unsold in the early 1970s. Even today, over three decades later, non-forest use of most industrial forest land has little, if any nonforest use market value today [sic]; counties tax most industrial forest land on that basis today (Atiyeh, et al.).

While the demand for rural lots may be higher today than in the 1970s given the increase in population, if the zoning restrictions were removed from all farm and forest land, there would be an over-supply of lots. In contrast, by removing the restrictions from a select few individual properties, demand is greater than supply, and those select lots benefit from the restrictions around them.

Clarity

Although the theory behind the monopoly method is based in economics, the monopoly value compensation method is easy to understand from a lay perspective. One simply looks at the current market value of a property to determine what that property would be worth if the offending regulations were removed. This latter value can be (and has been, in practice) determined by looking at comparable sales of the lot size desired, other appraisal methods, or asking a developer or real estate broker for an estimate of value.

Cost

There is little to no cost to a claimant under the monopoly compensation method. Under Measure 37, evidence that was accepted has been as little as a claimant's assertion that he or she could get a certain price for the desired lots. More sophisticated evidence was in the form of comparable sales available through a realtor or actual appraisals.

If use of the monopoly method is adopted, something more than a back-of-the-envelope estimation should be required. At a minimum, a Comparative Market Analysis from a realtor should be required. Preferably, an appraisal by a certified appraiser should be required. In either event, the cost would be minimal.

Fairness and Accuracy

As indicated above, the monopoly valuation method is neither fair nor accurate. This method grants the claimant a potentially substantial windfall. This method is not accurate, as we cannot know “whether the price differential has been caused by an increase in the value of unregulated property, a decrease in value of regulated property, or a combination of both” (Sullivan).

The problem with using the so-called “monopoly” valuation method is that it distorts the market of available property. As explained by Professor Andrew J. Plantinga, “fair market value refers to the price that willing and well-informed buyers and sellers would agree upon for a piece of property.” Under Measure 37, waivers created markets dominated by either a single seller (monopolist) or a few sellers (oligopolists)(Plantinga). Plantinga asserts that where only a single (or a limited number) of property owners can develop a parcel is incompatible with the definition of fair market value (Plantinga). That is, the lack of competition drives up the value of the developable land.

An example that has been used to illustrate the windfall of the monopoly approach is based on DLCD claim M119803 involving 54 acres of “prime” Class II Washington County farm land with no dwelling (Richmond & Houchen). The claimant, who acquired the subject property in 1965, filed a claim demanding \$9.5 million or, in the alternative, the right to develop the property into 97 half-acre, single family lots. The claim was based on the theory that if, in 2005, the claimant were exempted from farm zoning, but the farm zoning was left in place on the thousands surrounding properties, the value of claimant’s 54 acres cut into 97 half-acre lots would increase to \$9.5 million. DLCD approved the waiver finding that

Without an appraisal based on the value of 20,000 square foot lots or other explanation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enacted or enforced by the Commission or the department (oregon.gov/LCD/docs/measure37/finalreports/M119803_Bernards_Final_Report.pdf).

The \$9.5 million does not represent the lost value due to the regulation. Instead, it represents the value of the waiver. This amount not only includes any loss caused by the farm regulations, but also an increase in value (i.e., windfall) due to the fact that the surrounding property is still limited to farm uses, giving the claimant a monopoly.

The windfall is demonstrated by Richmond and Houcher, analyzing the regulations adopted since 1965. Regulations that have negatively impacted the value of claimant's property were the 1973 county regulations requiring 38-acre minimum lot size to most of the county's farm land. Because claimant only had 54 acres, she could no longer divide her property.

Before the county and state land use laws were adopted in 1973, farm land was selling for about \$1,279/acre. Richmond and Houcher assumed that 10 percent of this value was related to nonfarm residential use, resulting in a reduction in value of \$128/acre, or a loss of \$6,942, based on the 38-acre minimum lot size. Using a 10-year bond rate with compounding interest from June 1973 to February 2005, Richmond and Houcher come up with a loss of \$83,806.

The next regulation that restricted claimant's use of her property was in 1994, when the state adopted an 80-acre lot size minimum for high-valued farm land. In March 1994, LCDC adopted the \$80,000 gross income test for a farm dwelling, which may have prevented a farm dwelling on claimant's property. In 1994, the value of an unimproved

farm land home site was about \$55,000. Interest on that loss brings the compensation for the 1994 reduction in value to \$100,540.

Under this scenario, the total compensation due to the claimant is \$184,346, the sum of the 1973 reduction of \$83,803, and the 1994 reduction of \$100,540. This amount is well short of the \$9.5 million claimed by the claimant. The resulting windfall under the monopoly valuation method is 98.1 percent, or \$9,315,654.

If the monopoly method of valuation is used, either a Comparative Market Analysis or, preferably, an appraisal should be required. Such a requirement will ensure greater accuracy in estimates.¹⁴

Implementation

This method is easy to implement. Little to no evidence for the valuation is required of the claimant. Even less work is required of the government. Under Measure 37, many government entities, such as DLCD, simply assumed that the claimant had suffered a loss and accepted the claimant's assertion of loss. DLCD's findings stated that:

¹⁴ The mere submission of comparable sales by an applicant does not ensure accuracy. For example, in Metro Claim Council Order No. 06-001 (Darrin Black), the claimant submitted comparable sales of 12 properties. The claimant's property is located within the Damascus Urban Growth Boundary. In responding to the claimant's comparables, Metro noted pointed out that the sales were not comparable:

Of the 12, 11 of these properties are located inside of the Urban Growth Boundary. 10 are located within either Happy Valley or Gresham and all occupy prestige neighborhood locations with hilltop views or sweeping vistas. Examination of the Black property reveals the view is limited and the surrounding neighborhood can hardly be regarded as prestige either as measured in home value or design features. Whether the area evolves into a prestige urban neighborhood with full amenities remains problematic.

The comparable sales data also include 7 built properties (lots with homes on them). Their sales value averages \$597,000 with a maximum listed price of \$805,000. The recommended completed home sales price for the Black property is then given at \$935,000. We did not evaluate those "comparables" further since the recommended sales price of \$935,000 exceeded the average and the sales price of any one of the "comparable" homes. We do note that industry standards usually maintain a ratio of 4:1 to 3:1 between home sales price and lot price. In this instance the ratio is 3.98.

Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant/s acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulation(s) on the fair market value of the subject property is a reduction of \$xxx.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when the claimant acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. *Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.*

The Economist Approach

A preferable method to the monopoly valuation approach is one that will give the value the difference between a property's value both subject to and free of an offending regulation. However, to get an accurate measure, we need to find the value of the property as if the offending regulations were removed from not just the subject property, but all surrounding properties, as well. Unfortunately, when a property rights regulation is applied retroactively, this value is unobservable (Plantinga).¹⁵

Professors Plantinga and Jaeger have argued for an "economically appropriate measure of loss" resulting from land use regulations based on the Theory of Land Rent (Metro; *see also* Plantinga and Jaeger). The Theory of Land Rent has been described as

The value of land at any particular time is the future net profit from the land used in its most efficient allowable use. The market also adjusts (discount factor) this value to account for time and uncertainty as to future uses. What this means is that the original sales price incorporates future expectations about how the land might be used (Metro).

¹⁵ As explained by Plantinga, "we do not observe a price without the regulation because the regulation is and has been in effect. We do observe (or can estimate with relative precision) the value with the regulation, because it is generated in a land market that currently exists, but we need the hypothetical value to calculate the change in the value."

Under this method, compensation is based on the original purchase price (Plantinga). The original purchase price reflects the market's valuation of the income stream to be generated by the land (Plantinga). Under the economist theory, if an unforeseen regulation is adopted after the purchase of the property, the income stream is reduced.

Using the economist method, determining the present value of the property without the regulations is determined by taking the original sales price and bringing it up to the current date by using an appropriate price index (Metro).

Clarity

The economists approach is not simple to understand. It is unlikely that a lay person will be able to employ this method. In addition to understanding the concept, a property owner would have to determine the appropriate discount rate.

The only jurisdiction to have employed this method was Metro. Metro was able to use this method due to its on-staff economist. Smaller counties and cities would not have access to on-staff economists, which may result in lack of clarity in employing this method. Metro's application of the economist's approach illustrates the difficulty in determining the appropriate discount rate, as four rates were applied to claims (Table 3).

Cost

This method would result in costs to both claimants and jurisdictions in employing economists. For individuals, economists are not as readily available for hire as appraisers. Such scarcity could result in higher costs in proving loss of value. Jurisdictions would run into the same problem of hiring or employing economists. Costs to jurisdictions would depend on the number of claims in that jurisdiction.

Accuracy and Fairness

The economists approach does provide greater accuracy in determining loss in value and, as a result, avoids windfalls. Given the likelihood that the economists approach would have resulted in lower valuations than the monopoly method employed under Measure 37, more claims may have been paid. Additionally, the economists approach may have disproved some claims for loss in value.

A risk involved in the economists approach is that an incorrect assumption in determining the discount rate can result in a lower loss in value. Under Measure 37, lower loss in value would not have affected the right to a waiver, but may reduced compensation a claimant would be entitled to. Underestimating the loss in value would also be unfair to a claimant if relief under a property rights regulation were required to be proportional to the loss.

An example of the wide variations in value that can result from using a different price index can be found in Metro's reports on Measure 37 claims filed within that jurisdiction. Metro used 4 price indexes: (1) Portland/Vancouver CPI; (2) House Value Index; (3) Lot Value Index; and (4) S&P500 Stock Index. All but the S&P500 index are for the Portland/Vancouver area. The difference in the resulting price per acres using these indices ranges from 21.7% to 50.8% (Table 2).

Table 2. Metro Implementation of Economist Approach – Differences in Price/Acre Calculations Based on Index Used

Index	Price Per Acre			
	Claim No. 06-001	Claim No. 06-004	Claim No. 06-005	Claim No. 06-006
Port/Vanc CPI	7,016	6,283	126,795	22,563
House Value	11,002	11,523	235,815	27,336
Lot Value	18,946	17,454	351,155	44,375
S&P500	32,349	24,739	490,590	30,397
Average Price/Acre	17,328	15,000	301,089	31,168
% Difference High/low	21.7%	25.4%	25.8%	50.8%
Purchase/Claim Date	1979/2005	1977/2005	1977/2005	1977/2005

Source: Metro Reports in Claim Nos. 06-001, 06-004, 06-005 and 06-006

Implementation

Because of the difficulty in understanding this method, implementation would be challenging and could result in an onerous burden on claimants. Another factor hindering implementation would be the lack of historic sales data in many cases.

One option to make this method more feasible would be to have it headed by the state. The state, in coordination with the counties, could work to assign appropriate discount rates and provide worksheets to claimants with calculations to assist in completing claims. However, such mass production may limit the accuracy of this method.¹⁶ Also, claimants may not have trust in having government run system.

Even if the hurdle for claimants could be overcome, reviewing jurisdictions would be faced with the task of verifying submitted information. This may require hiring qualified economists, adding to cost, as well as the challenge of finding qualified individuals, especially in rural jurisdictions.

¹⁶ With regard to the economist approach, the Department of Justice raised the question of whether necessary data would be readily available to claimants and, if not, whether data for measurement could be developed by the state in a timely and cost-effective manner.

Appraisal Method

The appraisal method is currently used by Florida. Measure 49 requires appraisals for claims requesting 4 to 10 homes. Use of the appraisal method is consistent with takings law, under which “just compensation” is measured by the fair market value of the highest and best use of the property at the time of the condemnation complaint or the date the property is entered or occupied.” *State ex rel Department of Transportation v. Lundberg*, 312 OR 568, 825 P2d 641 (1992). While the reduction in value under property rights regulations do not amount to a takings under the legal sense of that concept, many of these regulations are based on the takings doctrine – that government regulation has reduced the value of property.

Several concepts are important to understand in employing the appraisal method of valuation:

1. Fair market value is the amount of money that property would sell for if it were offered for sale by a willing seller and purchased by a willing buyer. This involves what is known as an “arms length transaction” and assumes that both parties are well informed and that “the property has been on the market for a reasonable length of time.” *Highway Comm’n v. Superbilt Mfg. Co.*, 204 OR 393, 412, 281 P2d 707 (1955). Calculation of fair market value depends upon the existence of a market for the property or comparable land. Fair market value has been equated with real market value.
2. Highest and best use is the needed to determine fair market value. ORS 308.205(2) governs the determination of real market value for tax assessment purposes. To calculate real market value, the State has to determine the highest

and best use, because “a seller of property reasonably can expect to receive the highest offer from a prospective buyer who intends to put the property *to its most profitable use*” (*Hood River Valley Residents Committee*). The definition of “highest and best use” is:

The reasonably probably and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value (*Hood River Valley Residents Committee*).

Under the appraisal method, an appraisal will be required to show the fair market value both before and after the adoption of the subject regulation(s).

Clarity

While an individual layperson may not understand the logistics behind appraisals, property owners (and, more than likely, the general public) are generally familiar with the concept that appraisals are used to determine the market value of property. When one purchases property, an appraisal is required as a prerequisite to closing on the purchase. Thus the appraisal method provides clarity.

Cost

Claimants would be required to bear the costs of appraisals. This cost should not be considered overly burdensome in proving loss of value. Allowance can be made to include a reasonable amount of such cost in any finding of reduction in value, such as that provided in Measure 49 (OAR 197.424(7)).

Governments may be able to rely on assessment information or independent appraisal to confirm a claimant’s claimed loss of value. In either case, the cost to government should not be prohibitive. When weighed against the accuracy of appraisal

versus the monopoly method, the result may be a cost savings in the terms of potential pay out or cost to society.

Accuracy and Fairness

While the appraisal method may not be as accurate as the economists approach, it is a significant improvement over the monopoly (or back of the envelop) approach. It creates a balance between accuracy, cost and fairness.

As to fairness, the appraisal method does not create an undue burden on claimants. Nor does it create a windfall for claimants. This method should provide compensation equal to or close to the actual loss. This is especially true for newly adopted regulations, where information is readily available, and when applied prospectively, as opposed to retroactively.

Implementation

This standard will be relatively easy to implement. Claimants may need a short amount of additional time to obtain appraisals and government time to review appraisals. Appraisals should be required to be performed by state-certified appraisers, increasing the credibility of the evidence. In this scenario, the idea of government review should not be to create a battle of experts in all cases, but to verify the accuracy of a claimant's evidence.

One problematic aspect of implementing the appraisal method is caused by the fact that Measure 37 (and, subsequently, Measure 49) applied retroactively. That is, claims could, and were, filed for past regulations, as opposed to applying prospectively – to regulations adopted after the effective date of Measure. This presented difficulty for both the property owner and the government in determining property values at the time of

purchase or at the time of adoption of a land use regulation. Claims under Measure 37 were often based on land use regulations dating back to the early 1970s, 1980s and 1990s. An additional complication with retroactive applications, as demonstrated in Oregon, is that it can result in a large number of claims, requiring a lengthy amount of time to process those claims. If independent government appraisals were required for each claim, this will impose an even longer processing time on claimants and the jurisdiction.

Ballot Measure 49

Ballot Measure 49 was approved by the voters in November 2007. The measure offers a “fix” to Measure 37. Significant provisions of Measure 49 include:

- Claimants may build up to three homes (including any existing homes) if allowed when they acquired their properties. To streamline the approval process, those who choose to apply for up to three homes need only show they had the right to build the homes they are requesting when they acquired their property. No loss of value need be shown under this option.
- Claimants may build between 4 and 10 homes (maximum of 20 on all holdings) if allowed when they acquired their properties and they have suffered reductions in property values that justify the additional home sites. Appraisals are required to establish such reductions in value. Up to \$5,000 per claim for costs of appraisals and other costs of preparing claims may be added to the calculation of reduced values.
- This measure protects farmlands, forestlands and lands with groundwater shortages in two ways:
 - First, subdivisions are not allowed on high-value farmlands, forestlands and groundwater-restricted lands. Claimants may not build more than three homes on such lands.
 - Second, claimants may not use this measure to override current zoning laws that prohibit commercial and industrial developments, such as strip malls and mines, on land reserved for homes, farms, forests and other uses.
- Homebuilding rights are expanded by:
 - Extending homebuilding rights to surviving spouses whose claims are not eligible for compensation under Measure 37; and

- Allowing claimants to transfer their homebuilding rights to new owners, a right not clearly provided by Measure 37. The new owners must exercise their homebuilding rights within 10 years.
- Claimants who have received land use waivers under Measure 37 are entitled to complete developments under the provisions of Measure 37 if they have established vested rights to do so. Vested rights will be determined under common law.
- To validate larger claims, this measure requires those who choose to apply for four to 10 homes to show they had the right to develop the homes they are requesting when they acquired their property and that they have suffered a loss of value from prior regulations that justifies the number of homes requested. This measure establishes an ombudsman to help landowners who request assistance with their claims.
- Claims, both past and future, are limited to residential use.
- Future claims based on regulations that limit residential uses of property or farm and forest practices will require documentation of reduced values and provides for proportionate compensation when such reductions in value occur. Property owners will have five years to file claims involving regulations enacted after January 1, 2007 (DLCD).

Clarity

Despite its length, the concepts behind Measure 49 are relatively clear. Measure 37 claimants who opt to seek up to 3 homes merely needed to notify DLCD of this option. Claims for 3 homes were to receive priority and be “fast-tracked” by DLCD (Rustad).

Once a claim is processed, the claimant’s approval will identify the number of homes permitted, as well as any other conditions of approval (DLCD Measure 49 Guide). As put by Alwin Turiel during her time as Ombudsman for the Measure 49 process, DLCD is now the process of issuing development permits.

Because Measure 49 applies retroactively, development entitlements at the time the claimant purchased property are not always readily apparent. Another criticism of Measure 49 involves Measure 37 claims that have “vested.” The statute requires that the common law standards of vesting apply. These standards include:

- The amount of money spent on developing the use in relation to the total cost of establishing the use;
- The good faith of the property owner;
- Whether the property owner had notice of the proposed change in law before beginning the development;
- Whether the improvements could be used for other uses that are allowed under the new law;
- The kind of use, location and cost of the development; and
- Whether the owner's acts rise beyond preparation (land clearing, planning, etc.) (DOJ).

Some called for the state to determine which claims had vested. However, the state saw this as a local issue.

While property owners may see the vesting option as an avenue to gain more development rights beyond the 3-10 houses allowed under Measure 49, those rights will be subject to the restrictions of Measure 37. The primary restriction is that, unlike the development rights granted under Measure 49, the vested claims will not (1) be transferable or (2) survive the death of the claimant.

One of the downfalls for claims for four to 10 homes is that an appraisal for each regulation will be required for before and after the regulation was adopted. If a claim is based on Senate Bill 100, the Statewide Goals and subsequent regulations, the number of appraisals could quickly add up. Additionally, it may be difficult to determine property values going back 30 years.

Cost

For claimants seeking up to three houses, there will be no cost. It was initially thought that the time to process the Measure 49 claims for three or fewer homes would be minimal; it has come to light that this may not be the case. Instead, it may take up to four years to process these "fast-track" claims (Morrissey). One problem cited for this delay

is the fact that the legislature only approved half the requested budget for the Measure 49 division of DLCD (Morrissey, Kafoury).

In addition to the cost to government for processing Measure 49 claims, there is potential high cost for claimants seeking between four and 10 homes and for future claimants. In both of these circumstances, claimants will incur the cost of appraisals. However, Measure 49 allows up to \$5,000 in appraisal fees and other costs to be added to the loss in value. It remains to be seen whether this amount remains sufficient.

Accuracy and Fairness

Measure 49 achieves a greater balance of fairness between property claimants, neighboring property owners and the public good. As noted herein, there is question whether or not land use regulations have given rise to the extreme loss in property values claimed under Measure 37. Given the difficulty in measuring historic losses, Measure 49 strikes the balance by allowing up to three houses with no proof of loss. Of the 4,538 claims filed, 4,162 claimants elected this route. The risk with this option is that three houses may not totally compensate the total loss. However, this risk is offset by two significant factors.

First, given the tax incentives that have been provided to owners of resource land, this option does strike a balance between the needs of property owners and the general public, who have helped subsidize the reduced taxes on resource land. The second factor offsetting any potential loss to property owners is that development rights under Measure 49 are transferable and will survive the death of the claimant. In contrast, waivers under Measure 37 were not transferable and were extinguished upon the death of the claimant.

As noted under the section discussing Measure 37 and the monopoly approach to valuation, that approach was likely to lead to significant windfalls to claimants. Under Measure 49, those windfalls are only possible if a claimant moves forward on a vested rights claim. However, if one moves forward with this option, they do not receive the benefits of transferability and survivorship.

Measure 49 also provides greater fairness to neighboring property owners by limiting the number of houses available for relief. This serves several benefits, including:

- Protecting farmland from intrusive residential and/or commercial uses. Protecting farmland also serves the greater good of society, especially in light of the investment made by way of reduced taxes for resource land.
- Restricting the number of houses to 3 in high value farm or forestland or in ground water restricted areas.
- Last, but not least, protecting the quality of life expected by neighboring property owners.

With regard to claims for 4 to 10 home sites, the use of appraisals will require actual proof of loss. There is risk that the 10 home sites will not fully cover the loss.

Implementation

Because of the retroactive nature of Measure 49, implementation will cause a tremendous initial workload for the state. Unlike with Measure 37, additional research will be required by DLCDC staff into what a property owner could have done with his or her property at the time of purchase. This is causing delay in processing the “express” claims.

Local jurisdictions, on the other hand, have a decreased burden in processing claims. For the most part, they will only be required to assist DLCDC in performing research into historic zoning and planning regulations, much of which was compiled

during the three years Measure 37 was in effect. This has the added benefit of allowing local jurisdictions get back to the business of planning.

The advantages of Measure 49 do not end with processing claims. Once a claim is process, the property owner will receive a “ticket” spelling out exactly what he or she is entitled to and any conditions of that development. This reduces the burden the local jurisdictions in attempting to decipher state waivers, which were often confusing to both claimants and county planners. An added benefit is that transferability and survival of waivers are no longer an issue.

Conclusion of Valuation Methods

While the monopoly method is the least expensive (to both claimants and governments) to implement and the easiest method to understand, it leads to the greatest unfairness in terms of both windfalls to property owners, as well as burden on neighboring property owners and the general public welfare. The economist approach offers the greatest accuracy, but with the highest cost and least accessibility in terms of ease of understanding. Accuracy can be questioned, given the wide range of values with various price indexes.

The appraisal method achieves the greatest balance in fairness to claimants, property owners and the public good. It is an easy method to comprehend and is relatively low in cost to implement. However, it is not without its problems. Most problems arise when the appraisal method applied retroactively. In this circumstance, historic sales data and property values may not be available. Additionally, in states such as Oregon where numerous Goals, laws, rules and regulations may apply, multiple appraisals may be required, adding cost to both claimants and governments. For

claimants, allowing the cost, or a portion thereof, to be added to the loss in value, may offset this cost.

This analysis only answers part of the question of what constitutes a fair and balanced approach to valuation under property rights laws. As is gleaned from the analysis, how loss is measured is only part of the equation. Additional considerations, including the timing of valuation or measurement, value added by regulations, recapture of tax benefits and loss of value thresholds, are explored in the following section.

Additional Considerations

How we measure loss in value only answers part of the question of “what is a fair and balanced approach to valuation.” As referenced throughout this paper, Measure 37 was problematic due to (1) their retroactive application and (2) lack of a statute of limitations. Retroactive application complicates determining loss of value, as historic sales prices and/or property values at the time of adoption of an offending regulation are often missing. Other shortcomings of Measure 37 include

- The failure to take into account both the benefits derived from government regulations (often referred to as “givings”), as well as recapture of any direct benefits, such as tax abatements or subsidies;
- The failure to make relief proportional to loss;
- Lack of options for providing compensation for loss; and
- Failure to exempt certain actions and areas from claims.

With regard to givings, a percentage loss threshold can be used in lieu of measuring each benefit. A percentage loss threshold can also be used to recognize both the inherent risk of owning property and the need to protect the common good.

The following sections discuss the importance of timing of measuring value, statute of limitations, measuring government givings, recapturing tax credits, thresholds,

the importance of relief being proportional to loss, alternative forms of compensation and regulations to be exempt.

All of these factors were considered in Senate Bill 308 (SB308), which was drafted by the legislature in 2005 in response to Measure 37. The final section below outlines the components of SB308.

Timing of Measurement

How we should measure the loss of value caused by land use regulations only gets to half the equation. The other half is *when* we should measure the loss. Measure 37 required the loss to be measured “as of the date the owner makes written demand for compensation.”

Determining loss of value is not easy task, especially when property rights laws, such as Measures 37 and 49, apply retroactively. Because many claims under Measure 37 were based on family ownership, original sales price was not always available. For land that had been held in family ownership for long periods of time, assessment information, likewise, was unavailable. Additionally, loss of value is subject to many factors, including the time of purchase, appreciation of property values over time, and neighboring market values (Fiore). Thus, while it may not be possible to determine the exact loss of value, the challenge is to come up with a mechanism that is fair to the landowner, as well as the general public, and does not create a windfall for the property owner.

A more accurate method of measuring the effects of land use regulations is to compare the fair market value before the enactment of the regulation to the fair market value after the enactment. Using this timing will measure the loss *at the time of the*

“taking” and is consistent with takings jurisprudence (MacLaren). It has the additional benefit of avoiding the monopoly windfall.

Unfortunately, with the retroactive application of Measure 37 and 49, the historic fair market value immediately prior to and after the adoption of the regulation may not be available. Thus, using the timing of the adoption of the regulation may only be possible for recent or prospective land use regulations.

Statute of Limitations

Under Measure 37, claims were permitted either within two years of adoption or enforcement of a regulation. This left the time for filing a claim for compensation open ended, creating uncertainty for neighboring property owners and government. Neighboring property owners continually faced the risk of a nearby nonconforming use, while governments the cost of compensating a claimant upon enforcement of a regulation.

Florida, Mississippi and Texas statutes include statute of limitations ranging from 1 year in Florida and Mississippi, and 180 days in Texas. In contrast, the statute of limitations under Measure 49 is five years from enactment of the challenged regulation.

To create greater certainty for neighboring property owners and governments, it is recommended that a shorter statute of limitations be adopted.

Measuring Value Added by Regulations

What Measure 37 and its progeny ignore is the fact that, just as land-use regulations may decrease property values, they also add value, known as “givings.” Government “givings” are “those actions by government entities [that] increase land

values” (Cordes). Examples of givings are when the government upzones or changes a zoning ordinance to the benefit of property owners or when the government relaxes environmental regulations (Liberty). As noted by Metro Councilmember Robert Liberty, “just as with takings, the failure to consider givings results both in unfairness and in economic inefficiencies by government and private property owners.” Givings have also been called “windfalls” (Liberty). With regard to farmland, it has been said “much of the value of farmland is the result of government givings” (Cordes). Cordes offers the following example of givings in relation to farmland:

<u>Action</u>	<u>Value</u>
Farmland value before government action:	\$ 50,000
Government builds highway nearby that makes property accessible to suburbs; nearby development occurs:	\$300,000
Property zoned to exclusive farm use:	\$100,000

While some may argue that the rezoning of the property has resulted in a loss of \$200,000, taking into account the government action of building the highway has doubled the property value (Cordes).

On a simplistic level, land use regulations add value to property by preventing conflicting uses and providing more cost-effective public services through growth management and establishing parks and open space (Fiore).¹⁷ Land use regulations came about in response to an effort to protect residents from noise, noxious discharges and other incompatible uses (MacLaren). In Oregon, as well as other states with exclusive

¹⁷ These benefits were compromised by Measure 37, as neighboring property owners were at risk from conflicting land uses (Fiore). As reported by 1000 Friends of Oregon, the Lay family is a prime example of the detriment of Measure 37 development to neighboring farm land. The Lay’s have farmed 100 acres in Clackamas County for more than half a century. The owners are now elderly – 87 and 86 years old. Their son cannot work the farm, as he is disabled. The Lays decided to sell the farm. However, the offer they received fell through when the prospective purchaser learned that the neighbors had been granted a Measure 37 waiver to operate a gravel mine (Sightline Institute).

farm use zoning, the certainty of such zoning has helped farmers by protecting them from encroaching residential development. A study in Wisconsin found that farmers are willing to pay more for land zoned as exclusive farm use because the future of farming is more certain (Henneberry & Barrows).¹⁸ This was particularly true for large parcels located away from urban areas. As noted above, the conversion of farm land to residential use, and the conflict between that new residential use and on-going farming operations was one of the motivations for the adoption of the Oregon land use system.

Another example of land use regulation adding value in Oregon is the inclusion of land into an Urban Growth Boundary (UGB). An example of this is from Damascus in Clackamas County, which was included in the Metro UGB in 2002. The first step in the process of bringing in the 18,579 acres into the UGB was to include that area in the urban reserves (Liberty). Urban reserves are given priority under state law for addition to an UGB and, consequently, such a designation confers an increased speculative value. In 2002, 18,540 acres were added to the Metro UGB, creating an additional increase in value. Metro tracked the sale of 51 properties totaling approximately 600 acres in the Damascus expansion area and found that the increase in sales price per acre rose 150% after the UGB expansion and 330% over the pre-UGB price in 2004 (Table 3).

Table 3: Damascus Land Sales Increases Post 2002 UGB Expansion

Year	Sale Timing	Sales price/acre	% Increase
1998 – 2002	Pre-UGB sales	\$22,499	-
2002 – 2004	Post-UGB sales	\$55,584	147.1%
2004	Post-UGB sales	\$96,392	328.4%

Source: Liberty

¹⁸ This study still begs the question of how much value is lost in the event the farmer no longer wishes to farm and there may be a conflicting highest and best use of the property. It is for this reason that I do not argue that forest and farm land owners have not suffered any loss in value due to restrictive regulations but, rather, call into question how much value has been lost and how we can, as close as possible, accurately measure such loss.

Recapturing Farm and Forest Tax Credits

SB100 was not adopted without regard to the potential negative impacts on the values of farm and forestland. As explained above, SB101 was adopted to provide special assessments to farm and forestland, as result, reducing the taxes on such property. According to Ron Eber, DLCDC's former Farm and Forest Specialist, "the link between zoning and special tax treatment is essential to the success of Oregon's comprehensive planning due to the balance it strikes between public and private interest in the use of agricultural lands" (Girshkin).

The reduced taxes on rural land was made up by the 96% of the population who live in cities and suburbs and have paid \$3.8 billion more in taxes since 1973 (Richmond, Houchen). In light of this investment of urban taxpayers, it has been argued that Measure 37 is a "scam on county tax payers" for two reasons:

First, Measure 37 abruptly cancels that taxpayer investment, and the future income that investment otherwise would have helped secure. ***Second***, Measure 37 allows claimants, quite unknowingly, to effectively appropriate to themselves not just the \$3,440/acre worth of development rights which [sic] taxpayer payments previously have extinguished, but, also, the \$3,448 per acre investment county taxpayers made to extinguish those rights (Atiyeh, *et al.*).

The benefit of these tax breaks is not lost on the public. In DCLD Claim No. 129413, a neighboring property owner posed this question:

. . . What is just compensation? When the claimants had the ability to develop, they passed up the opportunity in favor of lucrative agriculture pursuits and favorable tax treatment. Now, they claim they have been adversely impacted and want full market value.

The benefits received, along with the fact that Oregon farmland has out performed the stock market since the 1970s (Richmond & Houchen) makes for a strong argument in favor of crediting the benefits when calculating the losses under Measure 37.

Percentage Loss Threshold

As noted above, government actions do not only result in a loss in an individual property value, they can increase property value. Property regulations also serve to balance the interest of the individual property owner against the public good. Unfortunately, the property rights movement has focused solely on the individual property owner, losing sight of a given regulation's effect on society. It would be impossible to balance the fairness of each regulation against every individual property owner affected. It is for this reason we look at the cumulative common good resulting from regulations over time. As explained by Cordes.

. . . any serious argument about fairness must recognize the significant regulatory benefits that flow to landowners as a result of other regulations. Focusing only on the burden caused by a particular regulation distorts the regulatory equation, making the government accountable for burdens imposed, but not giving the government credit for the benefits created (Cordes).

Measuring losses caused by government actions, as alluded to above, is a difficult task. While one might assume that the benefits imposed by government action will be recaptured in property taxes, that is not the case in states such as Oregon, which has a restriction on the amount that real property taxes can increase.¹⁹ Moreover, with regard to valuing the benefits and burdens of regulations under a property rights regulation, the cost of attempting to value each benefit may outweigh any gains. Thus, a threshold offers a method to recognize the general benefits of government actions. Additionally, a threshold can mitigate the “monopoly” affect such as that caused by Measure 37.

¹⁹ Measure 50, approved in 1997, limited any increase in property taxes to three percent per year. Measure 5, approved in 1990, capped property taxes at \$15 per \$1000 of assessed value - \$10 for general fund and \$5 for schools.

Using a threshold also recognizes that, property, like any other investment, has inherent risks. One of the risks in owning property is that of regulation (Cordes). This is especially true for potential uses, as opposed to lawfully established uses (Cordes). The Florida property rights' legislation recognizes that it is reasonable to expect a property owner to bear his or her proportionate share of a regulation imposed for the public good. While not a perfect match, a threshold can be used in lieu of attempting to calculate the benefits received from regulations.

Choosing a Loss of Value Threshold.

It is not enough to say that there should be loss of value threshold. A fair threshold must be determined. The success of a threshold can be evaluated by two questions: (1) Are property owners who suffered losses being compensated? And (2) Are compensation payments reasonably related to the loss suffered? (Hunt). To answer these questions, the following factors should be considered:

1. *Should government have broad or limited rights to impose regulations?* If a low threshold is adopted, it implies that the government's right to regulate the use of real property should be limited. If the threshold is high, it implies that the government should have a greater leeway in regulating property.

Given Oregon's history and desire to protect resource land, a value that still holds true, this consideration supports a higher threshold. A higher threshold is also supported by the fact that, unlike other states that offer greater statutory exceptions from their property rights legislation, Measure 37 offers very little exceptions. In contrast, the strength of the recent property rights movement may support a lower threshold, as there is greater resistance to the government's right to regulate property for the common good.

2. *Which risk is more important to avoid: Paying land owners who are ineligible or not paying landowners who are eligible?* It is impossible to determine with precision loss in value of property as a result of regulations. Such matters often become a battle of appraisers and/or assessors. If making sure all eligible landowners receive compensation is the prevailing concern, the threshold should be low. With a low threshold, there is risk that ineligible landowners will be compensated. However, if the primary concern is avoiding payment of ineligible claims, the threshold should be higher.

One of the early version of the proposed amendments to Measure 37 included a 20 percent reduction in value threshold (SB588(4)(g)). HB 3540a proposed a 10 percent threshold if only one regulation is involved and a 25 percent threshold for more than one regulation in a five year period. Ultimately, Measure 49 did not include any threshold. However, no loss of value is required for claimants seeking up to three home sites. In cases such as Measure 49, where some development is allowed without proof of loss, a higher threshold is warranted for claims for development above the matter-of-right allowance.

Using a percentage of the loss caused by regulations has been criticized as being flawed as arbitrary and resulting in expensive lawsuits over land value (Pivo). Using the above considerations mitigates any arbitrariness of a threshold. With respect to expensive litigation, Measure 37 has already led to much litigation. The valuation of property, by nature, is subject to interpretation and, as such, litigation. The addition of a threshold will only increase such litigation only so much as a property is determined not to meet the threshold.

Exemptions from Property Rights Laws

Measure 37 exempted regulations that protected public health and safety from claims. Measure 49 exempted high value farmland and groundwater restricted areas.

Florida, Texas and Senate Bill 308, discuss below, offer even broader exemptions.

Exemptions that should be considered include government actions or regulations necessary to:

- Carry out a federal requirement or receive federal benefits;
- Comply with federal law (e.g. Endangered Species Act);
- Prohibit or abate a nuisance;
- Protect groundwater;
- Regulate water safety; and
- Regulate public health and safety, including regulations that are intended to reduce the risk of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster. Such regulations may include building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations.

Proportionality and Alternative Methods of Compensation

As illustrated in the analysis of Measure 37, removing a regulation from a single piece of property creates a disproportionate benefit to that property owner. Thus, rather removing the offending regulation, relief granted should be proportional to the loss caused by that regulation. In order to accomplish this objective, a property rights law should provide for alternative methods of compensation. Methods to consider include:

- Cash or check
- Income tax credits and deductions;
- Exemptions from property taxes;
- Transferable development credits;

- Land swaps or exchanges
- Increases in density or intensity of use allowed on the property in question or a portion of that property;
- Issuance of a development order, variance, special exception or other extraordinary relief; and/or
- Purchase of the property in question (in whole or in part).

Senate Bill 308 – A Lost Opportunity

Following the passage of Measure 37, Senate Bill 308 was introduced during the 2005 legislative session. Senate Bill 308, which would have repealed and replaced Measure 37, represented effort address fairness to all – claimants, property owners and the public good. SB308 accomplished this by including a threshold, recapturing givings over a four year period, requiring that compensation be proportional to the loss and giving options for compensation. Under SB308, appraisals would have been required to prove loss. The proposed statute of limitations was one year from adoption of a regulation with the additional requirement that a property owner provide notice to the adopting government entity within 90 days of adoption reserving the right to file a claim. Unfortunately, the Bill did not gain traction for support.

The purpose of SB 308 was to:

- Establish a system to provide various types of compensation in specified instances when land use requirement reduced fair market value of property; and
- Establish a program for creation, purchase, sale, exchange or conveyance of transferable development credits.

Threshold Proposed

Senate Bill 308 (SB308) proposed two thresholds:

- 25 percent for a single restriction; and
- 45 percent for multiple restrictions (SB308 Sec. 2(1)(a)&(b)).

Givings Recapture

In determining whether a property's value was reduced as a result of government regulations, SB308 required looking at the past four years to determine if any government action had increased the subject property's value by five percent or more (SB308 Sec. 2(2)(b)). If the property value had been increased by five percent or more, the increase, less any fee or charge paid to the government for the action resulting in the increase, had to be included in calculating the reduction.

Compensation and Proportionality

SB308 required that compensation be proportional to the reduction in fair market value (SB308 Sec. 4(1)). Compensation could be granted in the form of:

- Cash
- Cash equivalent, including
 - For claims against the state, income tax credits and deductions
 - For claims against local government, exemptions from the property taxes imposed by that local government
- Land or development benefits, including
 - A modification, variance or adjustment of a restriction that is authorized by law and that results in an increase in fair market value
 - Transferable development credits
 - Land exchanges
 - Increases in density or intensity of use allowed on all or a portion of the real property or changes in density or intensity of use that do not exceed the overall density or intensity standards or
 - A modification of a condition of approval of a particular use of the real property.

Appraisal Method and Statute of Limitations

Under SB308, to be eligible to file a claim for compensation, a property owner would have been required to provide notice to the government agency adopting a

regulation in question within 90 days of the adoption (SB308 Sec. 6(1)). This notice, which would have reserved the right to file a claim was to include a description of the property in question, the regulation and an estimated of the percentage by which the property value was alleged to be reduced. The claim itself was to be filed within a year of adoption of the regulation upon which the reduction was based. Claims were to include an appraisal by a licensed appraiser.

Past Farm and Forest Regulations

Section 7 of SB308 did provide for relief for past land use regulations relating to land outside of urban growth boundaries and zoned for agriculture, forestry or mixed agriculture and forestry. This section allowed a Compensation and Conservation Board to grant relief where regulations adopted after a claimant purchased his or her property restricted the siting of a home on the property or the division of the property into two or more parcels. These claims were to be decided on an expedited basis and without proof of loss. The amount of compensation was to be determined by the Board based on factors including the fair market value of the right restricted (i.e., siting a home or dividing the property), regional differences and fairness factors, such as taxation practices and the measurable effect of public investment. The maximum number of parcels or lots to be eligible for relief under this section was 10.

Other Factors

Two other important considerations of SB308 include setting up a funding mechanism and a transfer development rights program.

Funding authorizations included allowing local governments to issue general obligation bonds not to exceed the amount of compensation; imposing a conservation and compensation tax; levying taxes not exceed allowable limits. The conservation and compensation tax was to be imposed when:

- New property or improvements were created;
- The property was subdivided or partitioned;
- The property was rezoned and used consistently with the new zoning;
- The property was an omitted property; or
- The property was disqualified from an exemption (SB308 Sec. 33).

The 5% tax, in essence, recaptured the benefit of government actions.

The transfer development right program was proposed to

- Compensate property owners for disproportionate reduction in the value of the real property that results from the application of land use requirements and sustaining those requirements by offering alternate development opportunities to property owners;
- Transfer development from locations within sending districts in which development is inconsistent with local or state land use planning objectives to other locations within receiving districts in which development will be compatible with those objectives;
- Enhancing the livability and suitability for particular purposes of sending districts and receiving districts and their surrounding communities;
- Promoting development in economically distressed areas of the state; and
- Increasing revenues from state-owned districts receiving transferable development credits (SB308 Sec. 18(1)(a)-(d)).

The programs were to be set up and managed by a new Compensation and Conservation Authority.

Summary of Senate Bill 308

While long and complex, the premise behind SB308 was to achieve a balance of fairness. Providing specific relief for past regulations solved the problems of the lack of

historic data and inability of government agencies to adequately budget for payouts. The bill provided flexibility for granting relief, funding mechanism and a transfer development rights program.

SB308 should have been a starting point for the 2007 legislative session in addressing Measure 37. Indeed, legislation of this nature should have been introduced after Measure 7.

Conclusion and Recommendations

Recommendations

For Oregon, Measure 49 represents a hopeful beginning in balancing fairness of the land use system so that individual property owners do not bear the burden of regulations for the public good. Measure 49 also represents hope in that it restores some semblance of order out of the chaos initially caused by Measure 37. However, Measure 49 should only represent the beginning, not the conclusion, of the discussion on property rights and fairness. Greater investigation is required in determining the effects of the 35-year old system to and whether or not the system has resulted in significant reductions in property values. While not addressed in this paper, it should also be the start of a conversation of what Oregon's system should look like going forward.²⁰

For other states, Oregon offers lessons to be learned. To be certain, it has been made clear that balancing the interests of the individual property owner's rights and the common good is no easy task. The property rights movement has shifted the focus from the common good to that solely of the individual property owner. This focus ignores the

²⁰ While the Big Look is expected to come out with its proposals in November 2008, given the limited public outreach of that effort, more action will be required.

benefits of government regulation on land value. The challenge going forward is taking into account both the individual property owner, neighboring property owners and the common good. The following is a list of considerations to be taken into account when drafting a property rights law:

1. **Prospective application.** As noted in the discussion above, the retroactive application of Measures 37 and 49 complicate the ability to accurately measure any loss of value (or, for that matter, benefits rendered by government actions). Typically, it is the exception to apply a law retroactively. The lack of historic sales and/or tax data can make retroactive valuation a nearly impossible task. Applying a property rights regulation prospectively creates greater clarity and fairness, reduces the cost for applicants and government and makes implementation easier. Although property rights advocates may not sympathize with the cost to government, money spent on processing claims will be taken away from other government services.

Applying a property rights law prospectively does not mean the jurisdiction should ignore loss in value based on historic regulations. Measure 49 offers an example of how to address such losses by allowing a limited number of home sites without proof of loss. However, this is not to say that “one size” should fit all. Oregon should further study the number of homes allowed, taking into consideration factors such as the size of the property, location, value of resource land, ground water availability and ability to service the property.

2. **Timing and Statute of Limitations.** Closely related to the prospective application of a property rights regulation when loss of value should be measured.

Under Measure 37, loss was measured at the time a claimant filed a claim. However, such timing is contrary to the takings doctrine of measuring loss of value at the time of the “taking.” Measuring at the time of filing a claim based on past regulations adds to the windfall under the monopoly method.

The complications arising from the retroactive application of a property rights law and basing the loss at the time of filing a claim illustrates the importance of having a relatively short statute of limitations. Under Measure 37, the timing for filing a claim was not based solely on adoption, but included enforcement of a regulation. Because of the public notice involved in adopting land use regulations, the statute of limitations for a cause of action should be no more than two (2) years of adoption of that regulation. Florida, Mississippi and Texas have adopted much shorter statutes of limitations – one year and 180 days, respectively. Extending the time to file a claim from enforcement of a regulation is inherently unfair to neighboring property owners, as well as government planning. By imposing a set statute of limitations, neighboring (existing or prospective) property owners can expect compliance with new regulations once the statute of limitations has expired. Similarly, governing jurisdictions can adequately budget for processing claims.

3. **Use of the Appraisal Method.** The appraisal method provides the greatest level of clarity and accuracy, as well as being the easiest to implement. Costs associated with this method are reasonable, and the result is avoidance of a windfall to a claimant.

Although the economist approach offers greater accuracy, the appraisal method is preferred method, as it is easier to understand and implement. The appraisal method is preferred over the monopoly method, such as that in Measure 37, in that it avoids windfalls to claimants and provides greater accuracy.

4. **Givings.** Land use regulations and government actions can, and often do, add value to property. Talking about regulations and government actions decreasing property values only addresses half the equation. The challenge is in finding an appropriate method of valuation to balance the benefits and burdens of government actions. Givings recognize the purpose of government actions, such as planning and zoning (which protect property values by prohibits conflicting neighboring uses) and public infrastructure (such as transportation facilities, water and sewer) of protecting the public good.

While it may not be possible to recapture or value every givings, these benefits need to be part of the valuation equation. Rather than attempt to measure the value of each beneficial government action, if a property rights regulation is adopted, givings can be recognized as part of the equation through the establishment of a threshold for when a property must be compensated for loss of property value.

Senate Bill 308 is an alternative to thresholds to take into consideration the benefits that government action can bestow on property values. However, because SB308 did not pass, we cannot measure its accuracy or ease of implementation.

5. **Thresholds.** Use of a threshold is an appropriate method of recognizing both the inherent risk of regulations and economic loss in real property, as well as the benefits of government regulations and actions. Determining a threshold will require taking into consideration tolerance for government regulation. If the consensus of the population is that government should have broad rights of governance, a high threshold may be adopted. If, on the other hand, there is little tolerance for government regulation, a lower threshold may be required. As illustrated by Oregon's unsuccessful attempts to agree upon a threshold for Measure 49, it will be a hotly debated topic.

Another question in determining a threshold is risk. The question here is which risk is more important to avoid: paying landowners who are not eligible (low threshold); or not paying landowners who may be eligible (high threshold)?

6. **Recapture of Direct Benefits.** Where a claimant has received a direct benefit in exchange for preserving land or foregoing development rights, such benefits must be taken into account in determining whether a loss of value has been incurred. In Oregon, such a direct benefit is the tax breaks afforded to owners of farm and forestland. If it is determined that government actions have resulted in a loss in property value, the direct benefit should be recaptured. Failure to recapture such benefits will result in a windfall for the property owner.

7. **Proportionality.** One of the downfalls of Measure 37 was that the relief granted was, more often than not, disproportional to the loss suffered. SB308 represented an attempt to rectify this, by requiring that "the compensation must have a value equal to the reduction in fair market value . . ." Of course,

proportionality requires accurate valuation. Proportionality also requires flexibility in the method of relief. As illustrated by Measure 37, wholesale removal of the offending land use regulations artificially inflated the claimant's property value, resulting in windfalls in the millions of dollars.

8. **Flexibility in Methods of Granting Relief.** Flexibility should be afforded to the regulating entity in granting relief. Methods of compensation could include some or all of the following:

- Cash or check
- Income tax credits and deductions;
- Exemptions from property taxes;
- Transferable development credits;
- Land swaps or exchanges
- Increases in density or intensity of use allowed on the property in question or a portion of that property;
- Issuance of a development order, variance, special exception or other extraordinary relief; and/or
- Purchase of the property in question (in whole or in part).

9. **Exemptions for Certain Types of Government Action.** Even Measure 37 recognized that certain government actions should be exempt from claims for loss of value. Florida and Texas, as well as SB308 and Measure 49, have recognized even broader exemptions. Exemptions should include (but not be limited to) government actions or regulations necessary to:

- Carry out a federal requirement or receive federal benefits;
- Comply with federal law (e.g. Endangered Species Act);
- Prohibit or abate a nuisance;
- Protect groundwater;
- Regulate water safety; and

- Regulate public health and safety, including regulations that are intended to reduce the risk of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster. Such regulations may include building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations.

Conclusion

The property rights movement has resulted in a shift away from considering the common good to focusing solely on the rights of the individual property owner. Measure 37 gave a glimpse into the potential impact that such a one-sided focus could have, with over 6,857 claims filed with the state seeking compensation in the amount of more than \$19,844,379,986. Measure 49 has served to restore some sense of normalcy in the Oregon land use system. However, given the rise in efforts by other states to adopt property rights regulations, it is time to take a step back and come to a better understanding of fairness in land use. To this end, the property rights movement has illustrated the need to strengthen public involvement and awareness regarding property governance and the benefits of land use regulations. The recommendations listed above will help frame the conversation as to a fair and balanced approach to measuring loss of value and providing compensation for loss caused by government actions.

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Acknowledgements and Thanks

Thanks to Professor Connie Ozawa, who encouraged me to undertake this analysis. Thanks to both Professors Ozawa and Ethan Seltzer for helping me shape the scope and for their patience. Most of all, thanks to my husband, Rahul Ravel – first, for bringing me to Oregon allowing me to appreciate, first hand, the beauty of this state, not just analyze its laws from afar. Most of all, thanks for your love and support over the last three years as I've pursued my masters, often taking time away from the home front. I could not have done this without you.