THE BATTLE OVER PROPERTY RIGHTS IN OREGON:

37.[2] The measure required just compensation to be paid to private property owners whenever a land use regulation enacted after the owner acquired the land had the effect of restricting the owner's use

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

The short-term effect of Measure 49 will be to place the government back in a position to regulate urban growth and land use to protect natural resources. As a matter of public policy, the government should be able to regulate urban growth to prevent uncoordinated development schemes and the destruction of Oregon's

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

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

A. The National Well-Orchestrated Just Compensation Movement

The history of Oregon's modern land use regulations dates back to the 1970s, when Oregon voters approved a comprehensive statewide planning regime.[11] One effect of this regime was to create urban growth boundaries (UGBs) around Oregon's cities in order to protect high value forest and farmlands.[12] The adoption of the statewide land use planning scheme was a reflection of Oregonians' desire to promote sustainable development and to protect the state's renowned natural areas, and it was also part of a larger nationwide "Quiet Revolution" to reform land use planning laws.[13] However, state land use planning laws came to be seen as an encroachment on private property rights, and a movement began to undo decades worth of work in state land use planning.[14] Private property rights advocates put on an aggressive campaign in 2004, and passed Measure 37, thereby drastically changing the focus of state land use planning.[15]

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

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

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

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

18. *See* FRED

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

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

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

37. § 197.175(2)(a).

38. § 197.175(2)(b).

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

40. *Id.*

41. *Id.*

42. Executive Summary, *Portland in Focus: A Profile from Census 2000*, THE B

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

The employment boom spawned a housing boom as more Oregonians sought the American dream of owning their own home. Notably, during this time period, the construction industry was the fastest growing sector of the Oregon economy, growing by more than 12%—the third fastest growing construction industry in the U.S.[47] The urban revival also led to unprecedented growth in the population centers that were home to the state's new industries. From 1980 to 2006 the population of the counties around Portland surged. Clark County increased by 115%, Washington County saw a population increase of 109%, Clackamas County 55%, and Multnomah County 21%.[48] Other notable population surges occurred in Deschutes County (Bend), growing by 140% and Hood River County, growing by 36%.[49] Throughout this high-growth time, it was impossible to drive through one of Oregon's metropolitan areas, especially Portland, without noticing the construction boom in the residential housing market. In 2000, it was estimated that 56% of residents owned their own homes—a considerable rise in the homeownership rate.[50] According to the U.S. Census Bureau, new housing permits for residential homes in Oregon went from less than 7,500 in 1982 to around 20,000 in the year 2000, with a peak of over 31,000 permits issued in 2005.[51] The high demand for new residential housing, coupled with record low interests rates for homebuyers, led to a never-before-seen demand for developable land in Oregon.[52]

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

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

47. *Id.*

48. U.S. Census Bureau, State and County QuickFacts, http://quickfacts.census.gov/qfd/states/41000lk.html (last visited Oct. 23, 2008); Portland Research Center, Census Statistics, http://www.pdx.edu/media/p/r/prc_Components_pop_ change_90thru2000.pdf (last visited Oct. 23, 2008).

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

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

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

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

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

III. MEASURE 37

A. An Overview

More than 30 years after Senate Bill 100 was passed, Oregonians voted to take a drastic turn in statewide land use planning. Measure 37 was part of a larger nationwide private property rights attack against the proponents of governmental regulation, an attack which saw the introduction of "takings and vested rights legislation in Congress and in every state."[53] With the passage of Measure 37 in November 2004 with 61% of the vote, Oregon would again propel itself to the forefront of the debate on property rights and sustainable land use planning.[54]t.5(na.asure 37 in)]TJ-12.8021,.28,H1ina.asurm0h7 TD0.le

of Metropolitan Studies (IMS), a research center at Portland State University that was hired to build a database of Measure 37 claims, the majority of Measure 37 claims came from the Willamette Valley and specifically from Clackamas County, which primarily lies just outside Portland's urban growth boundary.[58] Of the claims filed, the majority of the land was in areas that had been previously zoned for Exclusive Farm Use (2,877 claims), Forest Use (1,021 claims), Farm Forest Use (928 claims), and Rural Residential Use (628 claims).[59] The total acreage affected by Measure 37 claims topped 792,000 acres.[60]

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

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

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

63. *Id.* at 3.

64. *Id.*

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

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

Id.

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

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

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

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

The supporters of Measure 37 included Oregonians in Action, the property rights group that sponsored the measure.[75] The argument put forward in support of Measure 37 was premised on the constitutional requirement that government provide just compensation when it regulates property so as to effect a taking private property.[76]aOpornntsato ehe mpr kinan

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

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

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

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

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

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

83. Julie Sullivan,

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

If the Measure 37 claim was based on more than one regulation enacted on different dates, then the loss of value shall be calculated separately for each land use regulation and the losses caused by each regulation will then be added together to determine the total loss.[109] For example, if a property owner purchased a parcel of land in 1960, at a time when there were no regulations limiting development, and subsequently in 1973, a land use regulation was enacted preventing the development of homes on the land (for reasons other than public health, safety or that required by federal law),[110] the loss in value, if any, would be calculated by determining the value of the property in 1972, one year before the regulation was enacted, and then determining the value of the property in 1974, one year after enactment. If, after subtracting the 1974 value from the 1972 value, it

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

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

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

2. Property Inside the UGB

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

112. *Id.* at § 7(7)(c).

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

114. *Id.*

115. Flynn Espe,

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

Furthermore, development is limited by the fact that the total FMV of the dwellings cannot exceed the total loss in FMV caused by the enactment of the regulation(s).[122] The calculations of FMV are determined by using the same appraisal process used for property outside the UGB, with the main difference being that for appraisals of property outside the UGB the potential FMV of the property is determined by using the developable value of the property, whereas for property within an UGB the calculation of the potential FMV is determined by using the value of each single-family dwelling. For example, if an appraisal found that a land use regulation reduced the FMV of property outside the UGB by $1 million and the claimant, bl0.94.0787 tmnt wo6(u)-0.(e 371302 TD-0.01462 Tw0.0576 Tw[ )]TJT*4nt wo64.2(0.0w7(units, 15

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

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

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

133. *Id.*

134. *Id.*

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

136. *Id.*

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

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

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

D. New Claims

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

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

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

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

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

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

155. PLATT, *supra* note 7.

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

157. *Id.*

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

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

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

1. What Is Comprehensive Planning?

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

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

161. *Id.* (internal citations omitted).

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

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

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

165. *Id.* at 27 (citing WILLIAM I. GOODMAN & ERIC C. FREUND, PRINCIPLES AND P

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

2. Market Control of Land Use

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

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

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

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

172. *Id.* at 16.

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

174. *Id.*

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

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

3. State Control of Land Use Planning

Generally, the source of power for public land use controls stems from the state's exercise of its police power.[189] The police power enables the state to enact laws for the purposes of promoting the health, safety, and general welfare.[190] This power to regulate land use can be delegated to local governments.[191] Typically, the power is conferred through a zoning enabling act, such as the Standard State Zoning Enabling Act (SZEA) of 1924, the Standard City Planning Enabling Act (SPEA) of 1928, or the Modern Land Development Code (MLDC) of 1976.[192]

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

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

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

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

> A vision to prepare for "what if" scenarios.
>
> A blueprint to direct how the city should grow.

193. *See id.*

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

195. *Id.*

196. *Id.*

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

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

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

A moderate guide for future direction and a policy statement.

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

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

A streamlined checklist and

function of the regulatory takings doctrine is "to identify regulatory

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

In determining whether a land use regulation serves a proper governmental interest, the Supreme Court has been highly deferential to the legislature, and generally presumes such regulations are valid.[220] However, the argument for providing just compensation for a governmental regulation is premised on the idea that it is a necessary check on the government to prevent the extinction of private property ownership.[221]

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

to the important role that Oregon's natural resources play in the state, it is vital that land use planners be able to look at the long-term picture in creating and enforcing regulations that protect these lands from development. By looking at the issue in terms of individual gains as opposed to overall public benefit, opponents of government land use regulations fail to take all of the problems associated with

As seen in the post-Measure 37 era, when left to a market largely devoid of development restrictions, private property owners paid little heed to the environmental consequences of their decision to develop. Rather, the owners of private property sought to generate as much wealth as possible. While advocates of the free market may argue that the generation of wealth is in the best interest of environmental protection, the reality is that high-value natural resource land, once developed, is difficult to reclaim. Additionally, the environmental and social consequences of unchecked urban growth far outweigh the

Because the Task Force has not taken the time to define what sustainable development is, it will not be able to "effectively use sustainable development as the guiding principle for making development, environmental, and natural resource management

> substituting renewable resources for nonrenewable resources when possible.[259]

According to Professor Susan Smith, in order to achieve a sustainable use of nonrenewable resources, consumption must be minimized through efficient use.[260]

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

C. Recommendations

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

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

266. *Id.* at 12.
267. JURGENSMEYER & ROBERTS, *supra* note 8, at 326.

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

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

TDR programs allow a private landowner of high-value natural resource land to benefit economically through the creation of a market for development rights, rather than through the "development of that land or the payment of public funds."[270] Thus, the TDR program serves two functions. First, it allows for the preservation of valuable natural resource land.[271] Second, it provides a form of compensation to the landowner who is 4 Tc .1( )4the TJ0724ds.89.16s.885 0 0 7.5 329.4 427.56 T20.004 Tc0 Tw(

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

VII. CONCLUSION

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

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

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

276. *Id.*

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

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

279. *Id.*

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

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