

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DIANA V. GARDENER and
JUDSON M. PARSONS,

Plaintiffs-Appellants,

v.

MARION COUNTY BOARD OF
COUNTY COMMISSIONERS,

Defendant-Respondent,

and

LENA PAGE, as Trustee of the
Lena Page Living Trust,

Intervenor-Respondent.

Marion County Circuit Court
Case No. 06C 14580

Appellate Court No. A135077

BRIEF OF *AMICUS CURIAE* FOR OREGON CHAPTER OF THE
AMERICAN PLANNING ASSOCIATION AND THE
AMERICAN PLANNING ASSOCIATION

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I. INTRODUCTION

The Oregon Chapter of the American Planning Association and its parent national organization, the American Planning Association, (collectively “APA”), file this Amicus Brief in support of Petitioners-Appellants’ position in this case. APA’s statement of interest in filing this brief is found in the motion that accompanies this brief. Because the Court and parties are familiar with the facts and arguments, APA will not restate them here, but will rely on Petitioners-Appellants’ Brief on these matters.

This brief will establish that the State’s methodology for determining whether there has been a reduction in fair market value of the claimant’s property as a result of land use regulations, the so-called “exemption method,” is neither an accurate nor reasonable measure of evaluating the economic effects of the challenged regulation. The State failed to make a critical and correct inquiry into whether the applicant has conclusively established a reduction in value.

II. ARGUMENT¹

The State of Oregon has yet to experience the full reality of Measure 37. This is true not only with respect to the impact that Measure 37 will have on land use patterns in the state, but also with respect to the correct interpretation of the Measure itself. While the contours of the Measure may be relatively clear, within its details, ambiguities abound, as the lack of procedural methodologies and judicial precedent obscures the impact of the Measure and confounds those framing responses to it.

¹ The argument here is adapted from Edward J. Sullivan, *Through a Glass Darkly: Measuring Loss under Oregon’s Measure 37*, Urban Lawyer (forthcoming).

Valuation is an issue of particular ambiguity. ORS 197.352 does not specify a particular method for determining when a regulation has the effect of “reducing the fair market value.” The statutory language contains no express or implicit requirement that the determination be made either by measuring the reduction in value as a result of current enforcement of the regulation *or* by measuring the reduction as a result of the original adoption date for the regulation. The statute simply does not provide a methodology for valuation. Yet, valuation is the crux of ORS 197.352.

The statute’s only explication of valuation is largely confined to the following statement found in ORS 197.352(2):

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

In eminent domain law the words “just compensation” mean the price a willing buyer would pay for land from a willing seller with both parties having knowledge of the marketplace.² But the statute uses this eminent domain term to establish the obligation of a public body to pay for regulation, even though that public body is not seeking to acquire property for public use, as it would be under eminent domain law.³ As a result, the valuation methodology utilized in eminent domain law cannot be transposed to this statutory scheme.

Given the Measure’s lack of direction for determining reduction in value, coupled further with the inappropriateness of using “just compensation” from eminent domain law, governments facing claims under Measure 37 are left without direction.

² See, e.g., *State v. Lundberg*, 312 Or 568, 574, 825 P2d 641 (1992).

³ See, e.g., ORS 197.352(1)-(2) (2005).

Typically, local governments neither adopt strategic approaches to Measure 37 to limit the detrimental effects of waiver, nor consider whether paying all or some of the eligible claims may actually be in the public interest. Instead, cowed by inaccurate, hyperbolic estimations of the costs of land use regulations, with little time to decide claims, and facing the possibility of substantial judgments and attorney fees, local governments have largely abrogated any responsibility for protecting the Oregon land use program from the deleterious effects of Measure 37 claims by using an exemption approach. This approach considers the effects of the regulation on the specific property at issue but assumes there is no change to those same regulations as they apply to other properties subject to the same regulation. This approach generally overstates the financial impacts of the regulation at issue and appears to make any decision other than a waiver of regulations impossible.

The attraction to the exemption method lies both in its simplicity, and, from the claimant's viewpoint, its propensity to result in high loss estimates. As Professors Jaeger and Plantinga explain, the method assumes that,

“[J]ust compensation” under Measure 37 – that is, a government making up for the reduction in value of a property resulting from a land-use regulation – is equal to the increase in value if the regulation is waived for that property alone.⁴

The Measure 37 claim made in the City of Portland by Augustine and Lorraine Calcagno mirrors the application of the method and result in the present case, and also

⁴ See W.K. Jaeger & A.J. Plantinga, *The Economics behind Measure 37*, Oregon State University Extension Service, Feb. 2007, available at <http://extension.oregonstate.edu/catalog/pdf/em/em8925.pdf>.

serves as an illustration of how the exemption method works.⁵ The Calcagnos owned two parcels of land, totaling 19,400 square feet. A single residential dwelling was situated on each parcel. The property was rezoned sometime after their purchase, effectively reducing the number of units which could potentially be developed on the site by two-thirds.⁶ According to the authors of a report documenting their claim, the Calcagnos claimed “that land use regulations have decreased the value of their North Portland property by \$500,000. * * * They based their estimate on the assumption that the property can be sold for \$10,000 per allowed unit; thus, the loss of 56 units brought him [*sic*] to approximately \$500,000.”⁷

Although there was some disagreement about the exact amount, the Portland City Council concluded that it was “more likely than not that the challenged regulations have reduced the fair market value of the property.”⁸ Despite the discrepancy in the exact figures, the Calcagnos *and* the City Council both utilized the

⁵ See Sheila A. Martin Ph.D. & Katie Shriver, *Documenting the Impact of Measure 37: Selected Case Studies* (2006) [hereinafter Martin & Shriver]. The Calcagno claim is the basis of “Case study 2: The role of Community planning in North Portland. *Id.* at 22. Their compensation claim is considerably smaller than the majority of other claimants in the remaining nine Case Studies. The Calcagnos claimed \$500,000 in loss, while the average public payment claimed over the ten claims nears the \$3,000,000 mark. *Id.*

⁶ *In re Calcagno*, Ballot Measure 37 Claim for Compensation (ORS 197) Staff Report and Recommendations, Claim No. 05-117098 PR (Aug. 12, 2005) [Hereinafter Calcagno Staff Report], *available at* <http://www.portlandonline.com/shared/cfm/image.cfm?id=96464>.

⁷ Martin & Shriver, *supra* note 5, at 22. The claimants assessed the value of the land with only twenty units on at \$200,000 (20 x\$10,000). The staff at the City Council assessed the current value significantly higher. *Id.*

⁸ Calcagno Staff Report, *supra* note 6, at 8.

exemption method to quantify the loss caused by the regulation in question. Using the Calcagnos figures the calculation is as follows:⁹

\$500,000	=	\$700,000 (approx 60-70 units at \$10,000 per unit)	-	\$200,000 (approx 20 units at \$10,000)
Public payment	=	Value of Land an exemption from the regulation	-	Value of Land with the regulation

As with the majority of successful claims thus far, the City Council decided to invoke ORS 197.352(8) and, “in lieu of payment of just compensation,” waive the offending regulation (*i.e.* rezoning to a less intensive use) in favor of the Calcagnos.¹⁰

Land use regulations operate to demark regulated land from unregulated land.¹¹ The effect of land use regulations on land values, therefore, affects two variables: the value of the regulated land and the value of the unregulated land. The effects of the regulation may have *differing* consequences on the value of unregulated

⁹ The calculation uses the approximate figures asserted by the Calcagnos’ as per the Staff Report. Calcagno Staff Report, *supra* note 6, at 8. The calculation assumes, as presumably the Staff report did, that both the value *with* the regulation, and the value *without* the regulation reflects the ‘highest and best use’ of the property. If the regulation in question did not restrict the ‘highest and best’ use (say, as farm land, the property would be valued at \$1,000,000), then the owner would not have suffered any loss from the regulation, as the value would unaffected. Alternatively, if the regulation caused a change in the highest and best use (say, as farm land, the property would be valued at \$400,000) the loss would be less than that claimed (\$300,000 = \$700,000 – \$400,000). It also assumes a constant price-per-unit, which is a questionable assumption as one would expect the price to increase as the quantity is reduced.

¹⁰ The offending regulation was the R1 (Residential 1,000) zoning district, and the waiver enabled the Calcagnos to use the property as under the RH (High Density Residential) zoning regulations which were in effect at the time of acquisition. However, the ‘d’ overlay (Design Overlay Zone) is to remain in force as it did not restrict the use of the subject property. Calcagno Staff Report, *supra* note 6, at 7.

¹¹ Of course land regulations do not operate in a vacuum and the “unregulated” land is likely to be regulated in the sense that it is covered by some regulations. The point is the unregulated land it is not regulated by the regulation in question.

and regulated land. As Jaeger explains, “in both of these land markets, price adjustments will occur as a result of the regulation . . . [and] these changes will give rise to market adjustments and a price differential, or price wedge, between the two land markets – one that will equal the negative price adjustment (if any) in one market plus the positive change in the other market.”¹²

The exemption method is not an accurate method of quantifying loss caused by land use regulations simply because, while purporting to capture *only* the loss to regulated land, it, in truth, captures the price wedge between these two variables.

In his paper Jaeger draws an analogy with a boat tied to a coastal pier, and suggests that,

[if] we notice, after a period of hours, that the level of the boat is now below the level of the pier, we are unlikely to ask: did the pier move up or did the boat move down?¹³

In such a scenario we intuitively appreciate that we are dealing with one constant, the pier, and one variable, the boat. Therefore to measure variance of one variable—or the extent to which the boat has fallen—one merely has to measure the current difference (in length/distance) between the two. However, such intuition cannot be applied to the loss caused by land use regulations. As we have two variables, *both potentially affected by the relevant regulation*, we must question whether the price differential is due to an increase in value of one of the land markets,

¹² William K. Jaeger, *The Effects of Land Use Regulations on Property Values*, 36 *Envtl. L.* 105, 109 (2006).

¹³ *Id.*

a decrease in value of the other land markets, or a combination of both.¹⁴ To determine the “reduction in the fair market value” of the affected property, one must be able to separate the “effect... [of the regulation] on prices of the regulated lands from the effect on prices for unregulated lands.”¹⁵

Returning to the Calcagno case, the employed method of valuation made no attempt to distinguish between the loss in value of regulated property (the Calcagnos’ property with the regulation) and any increase in price of unregulated land (the Calcagnos’ property with the exemption from the regulation) caused by the regulation. It is asserted that the Calcagnos’ property, *unregulated*, is worth \$700,000, and that *regulated* it is worth \$200,000. However, one cannot know from using the exemption method 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. The regulation in question might have caused a significant decrease in the value of the regulated land, and only marginally increased the value of the unregulated land.¹⁶ Such a scenario is demonstrated in the following diagram:

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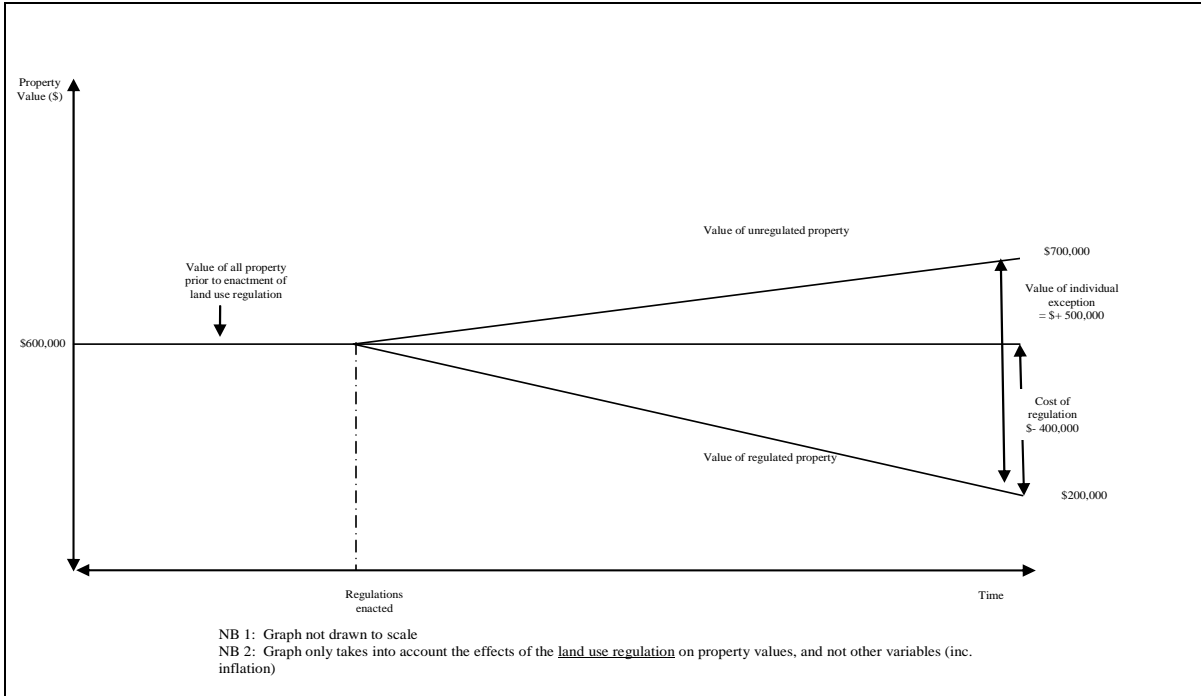
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¹⁴ The effects of a regulation, of course, are only one of a number of components which make up the lands value. In the following analysis, to highlight the effect of land use regulations, it is assumed that the regulation in question is acting in a vacuum and that the increase or decrease in land value is *entirely* derivative of the regulation.

¹⁵ Jaeger, *supra* note 12, at 12.

¹⁶ Say the value prior to the regulation was \$600,000. The increase in value of the unregulated land would account for \$100,000, and the Calcagnos’ land would have decreased in value by \$400,000.

Diagram 1



However, it is equally possible that the effect of the regulation was to increase the value of unregulated land dramatically, while having little of no effect on the value of the regulated land.¹⁷

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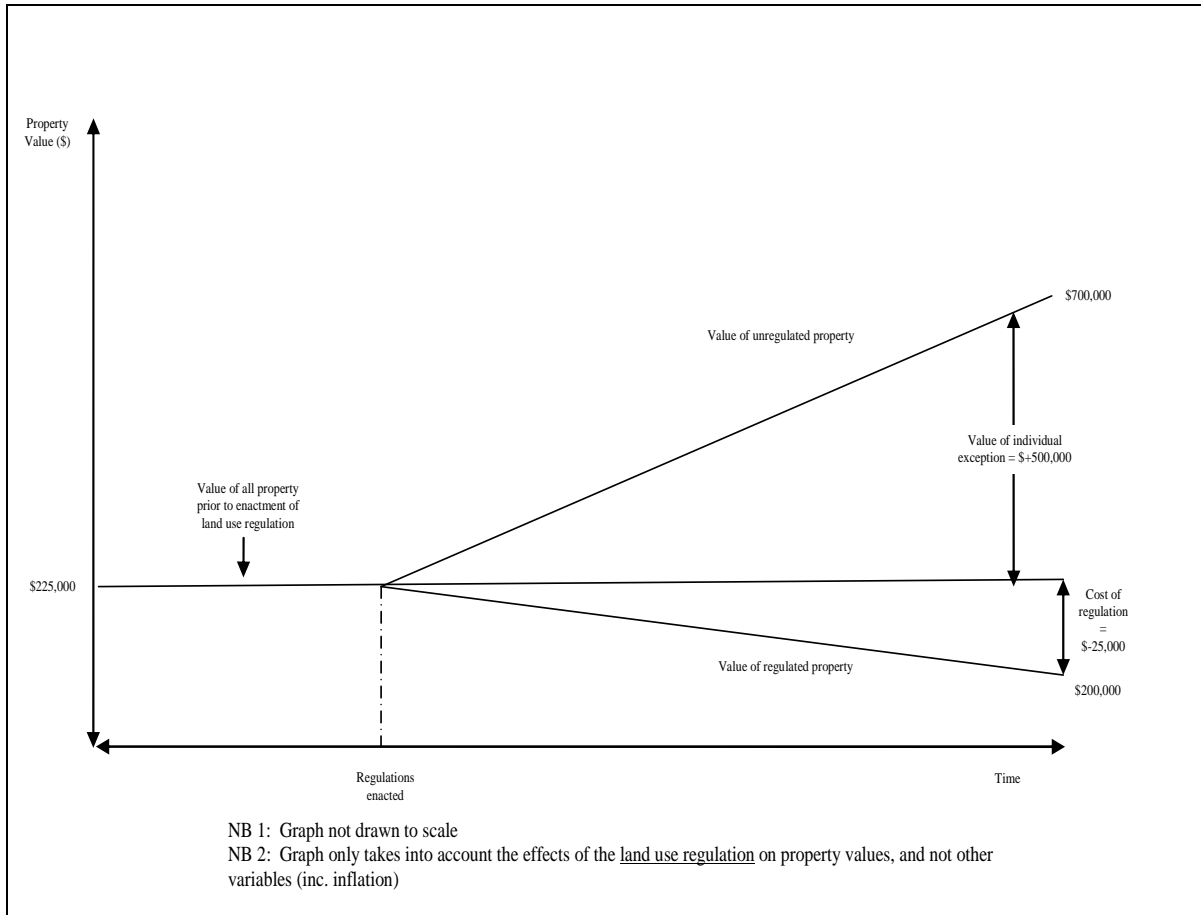
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¹⁷ Say the value of the property prior to the regulation was \$225,000. The increase in value of the unregulated land would account for \$475,000, and the Calcagnos land would only be decreased in value by \$25,000.

Diagram 2

In both scenarios the figures (\$700,000 - \$200,000) employed by the exemption method would remain the same, and thus the assessment of the loss would remain at \$500,000.

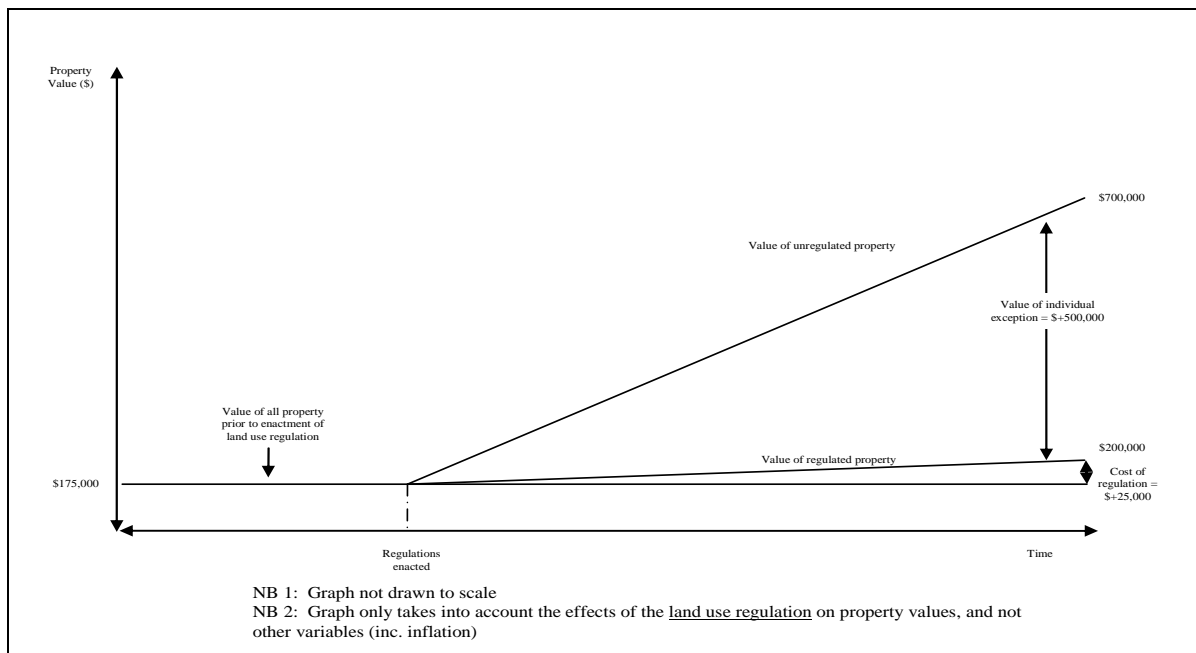
A third possibility is that the regulation in question causes an increase in value to both the regulated *and* unregulated properties. This may occur when the value of the neighborhood or amenity effects (*e.g.* extended tree cover, proximity to lakes and the like) outweighs any loss incurred by the regulated property (*e.g.* the prevention of

highest and best use).¹⁸ In such a case, the unregulated property is also likely to benefit from the regulation (the increase being due to both amenity effects and the increased scarcity of land).¹⁹ Assume in the Calcagnos’ case that the price prior to the enactment of the regulation was \$175,000. In this instance both the regulated property (at \$200,000) and the unregulated property (at \$700,000) have increased in value due to the “enactment and enforcement” of the land use regulation. One would therefore expect that an accurate calculation of the “reduction in the fair market value of the affected property” to be zero. However, the exemption method in such a scenario would still calculate the loss to the regulated land at \$500,000, as the following diagram illustrates:

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¹⁸ See, e.g., Noelwah Netusil, *The Effect of Environmental Zoning and Amenities on Property Values: Portland, Oregon*, 81 Land Econ. 227 (2003).

¹⁹ See Jaeger, *supra* note 12. Indeed, land use regulations have positive economic effects on land values through the use of amenity and scarcity effects. The difficulty with the exemption method is that it allows a claimant to point to the negative impacts of the regulation as if she were the only one affected, but not to look at the value-enhancing effects of the regulations as a whole.

Diagram 3

Under the exemption method, the analysis shows a “loss” despite the fact that the appreciation in the value of the regulated land is entirely due to the very same land use regulation being challenged.²⁰ An assessment of the difference between the current fair market value of the unregulated property (*i.e.*, the value of the property in question *without* the regulation applied) and the current fair market value of the regulated property (the value of the property in question *with* the regulation applied) is not likely to reveal with any degree of accuracy the effect of a land use regulation on a property’s fair market value.

²⁰ These examples assume the counterfactual, and for the purposes of highlighting the fallacies inherent in the exemption method, that the land use regulation is the only component which affects the value of land.

The exemption method tends to inflate the claim above any true loss.²¹ The hyper-inflated claim is produced by the exemption method because it allows an individual to claim that if she, and she *alone*, were granted exemption to the land use regulation, she could sell her property for the fair market value of unregulated property. However, in doing so, the land owner is often (perhaps unconsciously) attempting to “have her cake and eat it too”: claiming a particular land use regulation resulted in a *loss* in the *regulated* land’s value by reference to the *increase* in value of *unregulated* land *which that very regulation brought about*. This is because increasing the scarcity of a particular land use (by prohibiting, or limiting, the particular land use in the regulated zone); land use regulations often act to drive up the value of land where the particular land use is permitted (or unlimited).²² Jaeger explains this economic phenomenon as follows:

[T]he effects of the land use regulation will shift or constrain the supply of land in a way that affects both ... [regulated and unregulated] land markets. As this occurs, the market price for land put to use A may differ from the market price for land put to use B. For a land use regulation that limits the amount of land that can be put to use B, or one that requires that certain lands be put to use A, the effect of this land use regulation will be to increase the price of “B-land” and decrease the price of “A land.”²³

²¹ This is consistent with the findings of Hascic and Wu: in the vast majority of cases the Value of an Exemption (VIE) was greater than the Cost of Regulation (CR). Hascic & Wu, *Essays on Land Use Regulation*, Ch. 3, *The Reduction in Value Due to Land Use Regulation vs. the Value of Individual Exemptions: An Exploratory Analysis of Oregon’s Measure 37*, 57-121 (June 21, 2006) (unpublished Ph.D. dissertation, Oregon State University).

²² Assuming a constant level of demand, the decrease in supply of land where such a land use is permitted (or unregulated land) will generally result in an increase in value. Jaeger notes that this may not be the case in all scenarios. *See Jaeger, supra* note 12.

²³ Jaeger, *supra* note 12, at 110. He notes however that such a phenomenon does not occur in all scenarios; for instance an increase in supply of farm or forest lands

In essence, the “exemption” method puts the claimant in a monopolistic position, at least with reference to the other regulated land owners. It allows her to reap the benefits, in common with other land owners in the vicinity, of any amenity value which has been preserved or even enhanced by the land use regulation. But the successful claimant is also able to benefit from the fact that the regulation in question will have increased the scarcity (and, hence, the value) of land where the land use prohibited by the regulation is permitted. In both cases the relevant increase in value *may not have occurred if the land use regulation had not been “enacted or enforced.”*

Returning to the Calcagnos’ case for illustration of the monopolistic effect, assume all comparable land in this case was subject to the same R1 zoning regulations, which restricted the number of dwellings which could be developed on the property. Discounting variables such as view, proximity to amenities, and assuming the highest and best value of each plot of land was residential property, the value of each plot (and plots in the surrounding area) would be directly connected to the amount of units which could be developed on the property.²⁴ The restriction of the number of properties that can be developed per acre in the area by the “enactment and enforcement” of the residential zoning classification will drive up the price per unit. Thus, by granting to the Calcagnos an exemption from R1—so that they are able to develop more properties per unit than their comparables/neighbors—the exemption

may not cause their prices to decline, because their price depends primarily “on their productivity, and on the value of what they produce in the marketplace.” *Id.*

²⁴ Even if the extraneous variables were included, the land use regulation restricting the density of urbanization would have a significant impact on the value of the affected land.

will result in an increase in the value of their land. Yet the high value of the units “per unit” is due only to the restriction in number of units in the area *brought about by the regulation*. If the exemption were waived for all property owners in the vicinity, or had the regulation never been enacted, the increased competition would have driven down the value per unit. Moreover, the land use regulation, by restricting the maximum number, density and height of the units, is likely to have maintained or increased the amenity value—such as the unrestricted view, the prevention of the levels of traffic which would have resulted from higher density, and the like—from which the Calcagnos’ land, and consequently its value, would have benefited.

III. THE POLICY CONSEQUENCES OF THE EXEMPTION METHOD

Establishing a comprehensive and understandable method of valuing alleged loss under Measure 37 is of paramount importance. Such a method is necessary to ensure all public bodies apply the Measure in a manner that is not only comprehensible and accurate, but also consistent with its text, context and legislative history, thereby ensuring payment only to those who have suffered a *true* loss, as defined by the statute. A valuation methodology for Measure 37 claims that does not fit with a justifiable (and justified) interpretation of the statute undermines both legislative and voter intent. Both must be examined as Measure 37 was specifically made part of ORS ch. 197, so that both the Measure, as well as the remaining portions of that chapter, must be considered in any analysis of the application of the Measure.

A fallacy of the exemption method is that it targets the wrong differential. As seen, it attempts to capture the price wedge between the current value of properties *not* regulated by the land use regulation and the current value of those properties that

were regulated. This differential lacks any correlation with the “loss” suffered by the owner of the regulated land.

Indeed, the amount of lost value may be minimal. Nevertheless, decisions on Measure 37 Claims frequently state, “without an appraisal, or other explanation, based on the value of a dwelling on the subject property, it is not possible to substantiate the specific dollar amount the claimant demands for compensation.”²⁵ Public bodies frequently do not require that a claimant produce any actual evidence of a reduction in fair market value resulting from the land use regulation—a claimant need only to establish that there has likely been *some* reduction in value in order to obtain a waiver.

The Oregon land-use planning system requires the adoption of comprehensive plans and land-use regulations consistent with a series of uniformly applied statewide land-use goals. Land-use decisions involving individual parcels must be consistent with both the regulations and the plan. A system of exemptions or waivers of regulations for individual parcels will lead to a patchwork of incompatible land uses, as well as an incoherent and possibly unenforceable planning policy for the State. The basic premise for the land use system established under ORS 197.005 is: “uncoordinated use of lands within this state threatens the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.”²⁶

²⁵ See, e.g., Dept. of Land Conservation and Development, Final Staff Report and Recommendation, Arnold & Betty Beaudry, Claim No. M118373 (Oct. 19, 2005), available at http://www.oregon.gov/LCD-docs/measure37/finalreports/M118373_Beaudry_final.pdf.

²⁶ ORS 197.005(1).

Remembering that the decision to pay or waive is not taken in a vacuum, but must be made against the background of state policy on land use, and that any decision must be justified by reference to this policy, the notion that local governments should adopt such a “damage-limitation” procedure is reinforced.²⁷

As one commentator has noted, the “inconsistent uses [created by local governments waiving land use regulations] can frustrate many aspects of the comprehensive plans, including those that were intended to implement [urban] statewide planning goals”²⁸

Most critically, public agencies need sound valuation methodologies to ally a functional planning system with the realities of the payment scheme set out in Measure 37. This is true both retrospectively—managing those claims pursuant to pre-Measure 37 land use regulations, and prospectively—ensuring future land use regulations are not rendered wholly impotent. For those dedicated to protecting Oregon’s land use planning system, the establishment of accurate valuation methods is one of the first of many steps that will lead to the re-establishment of effective planning policy, the limitation of piecemeal development, and the prevention of planning sclerosis.

However, the sclerotic effect that Measure 37 will have on the future of planning in Oregon is potentially more serious than the lack of strategic policy by public agencies to deal with past claims. When attempting to make light of the impact

²⁷ As noted above, Measure 37 was specifically made part of ORS ch. 197 by its terms.

²⁸ Glenn Klein, *Measure 37: (Un)Intended Consequences on Land Use Planning*, Report distributed at the 2006 International Municipal Lawyers Association Annual Conference. (on file with author).

of the Measure on Oregon planning law, Measure 37 supporters tend to overlook the chilling effect the Measure has on future planning policy.²⁹ The chilling effect results from the fact that all new regulations or amendments to plans, so long as they cannot be squeezed into the relatively narrow exceptions contained within section 3 of the Measure, will be *de facto* inapplicable with regard to *all* the affected Oregonian residents—at least if the regulation causes a devaluation in the fair market value of their property. Indeed, a commentator notes that the paralytic effects are already being felt with, “many cities hav[ing] postponed or abandoned initiatives to amend their comprehensive plans and land use regulations.”³⁰

Again, the issue of valuation is of paramount importance: establishing accurate, practicable methods of quantifying loss would at least allow local government planners to produce cost estimates for future planning regulations, and force local governments to think about how to deal with these costs. For instance, if a regulation fell outside one of the statutory exceptions, then the planner could establish

²⁹ See Leonard Gilroy, *Statewide Regulatory Taking Reform: Exporting Oregon’s Measure 37 to Other States*, Reason Foundation, Apr. 2006. In his paper Mr. Gilroy attempts to dismiss the myth that Measure 37 “decimates land use regulation,” however he restricts his comments on the effects of the measure on prospective planning policy to the notation that “Measure 37 . . . does not prohibit the State of Oregon and/or local governments from adopting laws that regulate public health and safety,” before going on to list some of the other exceptions found in section 3. Gilroy does *not* discuss the very factor that threatens to decimate land use regulation: the impact of Measure 37 on those land use regulations which do not fit within one of the listed exemptions. *Id.*

³⁰ Klein, *supra* note 28. Indeed, the Metropolitan Service District in Ordinance 05-1077, adopted on September 29, 2005, took a less regulatory and more educational and site acquisition through purchase approach in dealing with natural resources in the Portland Metropolitan area. Whether that approach is more successful is yet to be determined. In addition, the use of the Endangered Species Act and the various federal acts relating to air and water quality provide a fairly comprehensive backup for the regulatory approach in any event. *Id.*

the total cost, assuming all current landowners are likely to make Measure 37 claims that the local government would have to bear to ensure the regulation was fully potent. From this quantification it would again be possible to perform a cost-benefit analysis, factoring in the added costs of the Measure 37 claims, to determine whether the proposed regulation should be enacted or enforced. The American Planning Association does not foreclose the possibility of several methodologies meeting the statutory standard—it does suggest, however, that the method used by the trial court is inconsistent with that standard.

Finally, establishing truly probative and comprehensible valuation methodologies is necessary to ensure consistency, which is important for two reasons: first, it ensures the fair and equal application of the Measure 37 procedure between claimants, and second, it creates a predictable system.

While consistency is an important safeguard for claimants, it also has a wider benefit in the form of predictability. Prospective Measure 37 claimants will be able to assess informally their chances of succeeding on the question of loss, prior to making the claim. More significantly, public bodies will be less cowed by the attorney fees provision of the Measure; so long as they correctly apply a well-reasoned and uniformly agreed upon method of valuation, there should be little opportunity for claimants to argue that their claims have been improperly denied, at least with regard to the “reduction in fair market value” criterion.

Establishing lawful and understandable methods for quantifying the devaluation in the fair market value of properties affected by the land use regulation is imperative, both to ensure consistency of application, and also to begin formulating a

strategic response to the threat Measure 37 poses to Oregon's land use system. Public agencies must now consider how to evaluate the validity of Measure 37 compensation claims consistent with the Measure and the unamended portions of ORS ch. 197. The methodology of the challenged decision based on the exemption method does not do so, and the judgment below must be remanded.

DATED this 20th day of September, 2007.

Garvey Schubert Barer

Edward J. Sullivan, OSB 69167

Carrie A. Richter, OSB 00370
Of Attorneys for Oregon Chapter of the
American Planning Association

CERTIFICATE OF FILING AND SERVICE

I certify that on the date indicated below, I filed the original and twenty (20) copies of the enclosed *BRIEF OF AMICUS CURIAE* FOR OREGON CHAPTER OF THE AMERICAN PLANNING ASSOCIATION AND THE AMERICAN PLANNING ASSOCIATION with the:

State Court Administrator
 Supreme Court Building
 1163 State Street
 Salem, Oregon 97301-2563

by first-class mail, postage prepaid. On the same date, I served two copies by first-class mail, postage prepaid, on the following parties:

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