

MAKING LANDOWNERS WHOLE WITHOUT PUTTING  
HOLES IN ZONING: PERSONAL WAIVERS AS THE  
SOLUTION TO THE PARTIAL REGULATORY TAKINGS  
COMPENSATION ISSUE

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INTRODUCTION

George Forsman owns twenty acres of farmland in Oregon.<sup>1</sup> At the time of purchase, there were relatively few restrictions on its use—for example, if he wanted to subdivide and build housing, he was free to do so.<sup>2</sup> Later, the government placed restrictions on the land, prohibiting such development and dramatically decreasing the market value of Forsman's property.<sup>3</sup> Such financial misfortune is not uncommon among landowners. This is especially true in Oregon where the state implemented some of the most restrictive land use regulations in the nation in an effort to protect economic and natural resources.<sup>4</sup>

Supporters of property rights struck a blow against Oregon's strict land use regulations in 2004 when they passed a referendum unique at the time.<sup>5</sup> Known by its ballot measure number, "Measure 37" required governments enacting regulations to compensate property owners for the lost value of their land due to the regulation, either by paying monetary damages or by granting a waiver from the regulation.<sup>6</sup> George Forsman applied for and received a waiver, giving him the right to utilize his property for any use that was "permitted when he acquired his interest in the

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<sup>1</sup> Laura Oppenheimer, *Measure 37 Question: Is Land Use Law Usable?*, *THE OREGONIAN*, Mar. 26, 2006, at B1.

<sup>2</sup> See *In re Forsman*, D.L.C.D. M120533, ¶ 2 (2005) (final order), available at [http://www.oregon.gov/LCD/docs/measure37/finalreports/M120533\\_Forsman\\_Final\\_Order.pdf](http://www.oregon.gov/LCD/docs/measure37/finalreports/M120533_Forsman_Final_Order.pdf); Oppenheimer, *supra* note 1.

<sup>3</sup> See *Forsman*, D.L.C.D. M120533, ¶ 2; Oppenheimer, *supra* note 1.

<sup>4</sup> See William A. Van Vactor, Jr., *The Backlash to Land Use Regulation Continues: An Analysis of Oregon's Measure 37*, 26 *J. LAND, RESOURCES & ENVTL. L.* 221, 224-25 (2005).

<sup>5</sup> OR. REV. STAT. ANN. § 197.352 (West 2005) (amended 2007).

<sup>6</sup> § 197.352(1), (8).

[p]roperty.”<sup>7</sup> Forsman wanted to sell the land rather than investing his own financial resources in the development venture.<sup>8</sup> However, Measure 37 was unclear as to whether the waiver applied to Forsman personally or whether it would run with the land.<sup>9</sup> If the right was transferable, Forsman could sell the land to an interested buyer for \$2 million.<sup>10</sup> Without a transferable waiver, the land was far less valuable.<sup>11</sup>

Some argued that the Measure 37 waiver was personal to the current property owner,<sup>12</sup> while property rights advocates claimed that waivers were intended to be transferable to subsequent owners.<sup>13</sup> This disagreement was hardly the most contentious aspect of Measure 37, which faced a slew of criticism after its enactment.<sup>14</sup> In 2007, the legislature stepped in with a measure written to fix<sup>15</sup> or destroy<sup>16</sup> Measure 37, depending on one’s per-

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<sup>7</sup> *Forsman*, D.L.C.D. M120533, ¶ 2.

<sup>8</sup> Forsman owns land in Florida, which he could sell to finance the development of his Oregon land, but he is reluctant to do so. Oppenheimer, *supra* note 1. Furthermore, he is concerned that many other people in his situation do not have other assets to apply towards developing their land personally. *Id.* At the time of the article he wanted to pursue a class action lawsuit. *Id.*

<sup>9</sup> See Oppenheimer, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> See *id.*

<sup>12</sup> Letter from Stephanie Striffler, Special Counsel, Or. Dep’t of Justice, Office of the Att’y Gen., to Lane Shetterly, Dir. of Or. Dep’t of Land Conservation and Dev., 1 (Feb. 24, 2005), <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf> [hereinafter *Attorney General’s Letter*]; Letter from George W. Neilson, Cir. Ct. Judge, to Counsel Re: *Crook County v. All Electors et al.* 11 (Aug. 11, 2006), [http://www.doj.state.or.us/hot\\_topics/pdf/measure37/crook\\_co\\_decision.pdf](http://www.doj.state.or.us/hot_topics/pdf/measure37/crook_co_decision.pdf) [hereinafter *Crook County Decision*].

<sup>13</sup> Ballot Measure 37, Frequently Asked Questions, <http://measure37.com/measure%2037/faq.htm> #6 (last visited Nov. 13, 2007).

<sup>14</sup> Randi Bjornstad, *Families Hope for Relief from Revised Measure 37*, THE REGISTER-GUARD (Eugene, OR) (quoting a frustrated homeowner: “It’s been one whack after another. If (the Legislature) doesn’t wake up and take care of families, the voters are never going to support what they’re trying to do to fix what’s wrong with Measure 37.”); Timothy Egan, *Oregon’s Property Rights Law Kicks In, Easing Rigid Rules*, N.Y. TIMES, July 25, 2006, at A14 (citing criticism from government officials, suburban residents, a professor and a farmer of the overreaching nature of Measure 37, and specifically highlighting one Measure 37 claimant who proposed to build a geothermal power plant on his property which sat within a National Park); Laura Oppenheimer, *Measure 37 Changes in Works*, THE OREGONIAN, April 7, 2005, at B1 (noting the Measure 37 debate’s “two hotly contested issues: whether new development rights transfer when the land is sold, and whether to set up a compensation system”); Laura Oppenheimer, *Measure 37 Election: Emotions Will Flow in Battle Over a Rewrite*, THE OREGONIAN, May 5, 2007, at B1 (citing a poll which showed that “most Oregonians support Measure 37 reform”).

<sup>15</sup> See, e.g., 1000 Friends of Oregon Supports Measure 49, [http://www.friends.org/issues/m37/vp\\_1KF\\_yes49.pdf](http://www.friends.org/issues/m37/vp_1KF_yes49.pdf) (last visited Nov. 21, 2007) (“A YES vote on Measure 49 will fix the Measure 37 mess.”).

<sup>16</sup> See, e.g., Oregonians in Action, <http://measure37.com> (last visited Nov. 21, 2007) (“[I]f Measure 49 is approved, Oregon will return to the days before 2004, when state and local governments imposed land use regulations without regard to the impacts that those regulations had on the property owners being regulated.”).

spective.<sup>17</sup> The new measure alters eligibility for compensation, throwing Oregon's regulatory takings regime into flux once again.<sup>18</sup> Significant to this Comment, it also addressed the matter of transferability, conceding that waivers may be conveyed to subsequent owners.<sup>19</sup>

Other states have considered enacting partial regulatory takings measures, including six Western states which voted in 2006 on measures similar to Measure 37.<sup>20</sup> Perhaps learning from Oregon's experience, some took care to clarify that the waiver is transferable.<sup>21</sup> However, that is not the only option, and the decision between transferable and personal waivers ought to be weighed carefully, as it may dramatically change the measure's impact on property owners and on the community itself.<sup>22</sup>

This Comment compares the impact that personal and transferable waivers<sup>23</sup> may have on property rights, both in the ability to achieve "fairness" initially and the consequences transferability may have on development in the future. Personal waivers, though less popular with the proponents of compensation legislation, offer more rights to the property owner than detractors typically credit them, while still allowing states to regulate.<sup>24</sup> Furthermore, transferable waivers have the potential to put the property owner in a better position financially than before the regulation was

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<sup>17</sup> The measure passed with 61% of the vote. Eric Mortenson, *Voters keep cigarette tax as is but redefine land-use laws*, THE OREGONIAN, Nov. 7, 2007, at A1.

<sup>18</sup> Eric Mortenson, *Claims Stall Until Measure 49 Sorted Out*, THE OREGONIAN, Nov. 9, 2006, at B1. The impact of Measure 49 on existing rights under Measure 37 is a "bubbling dispute" among land-use lawyers. Eric Mortenson, *Couple Prevail in Property Claim*, THE OREGONIAN, Nov. 16, 2006, at B1. Quickly summarized, Measure 49 limits development rights, specifically "prohibiting the large subdivisions and industrial and commercial development" and limiting developers to "three homesites, or four to [ten] if they can prove by appraisal that land-use laws sufficiently devalued their property." *Id.* However, the alterations of Measure 37 are outside the scope of this article.

<sup>19</sup> The waiver may be transferred with the property, but once it has been conveyed the new owner has ten years to develop or the waiver disappears. H.B. No. 3540 §11(6) (2007). No time limit is imposed on original owners to develop once they have obtained a waiver. *Id.*

<sup>20</sup> Six states considered ballot initiatives similar to Measure 37 in November 2006: Arizona, California, Idaho, Montana, Nevada, and Washington. National Conference of State Legislatures, *Property Rights Issues on the 2006 Ballot*, Nov. 12, 2006, [http://www.ncsl.org/statevote/prop\\_rights\\_06.htm](http://www.ncsl.org/statevote/prop_rights_06.htm). Arizona's measure passed; California, Idaho and Washington defeated the measures, and in Montana and Nevada the measures were not voted on due to technical failures. *Id.*

<sup>21</sup> See *infra* notes 113-15 and accompanying text.

<sup>22</sup> See *infra* Part IV.

<sup>23</sup> To clarify a possible confusion, the concept of "transferable waiver" as used in this paper addresses the ability of a current property owner to transfer the right to develop the same property to a subsequent owner—that is, the right would run with the land. See *infra* note 117. For a discussion of transferable development rights, wherein the right to develop is transferred from one property ("sending site") to a different property ("receiving site"), see Keith Aoki et al., *Trading Spaces: Measure 37, MacPherson v. Department of Administrative Services, and Transferable Development Rights as a Path Out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273 (2005); Caroline E.K. MacLaren, *Oregon at a Crossroads: Where Do We Go from Here?*, 36 ENVTL. L. 53 (2006).

<sup>24</sup> See *infra* Part IV.B.

passed, giving the landowner a windfall while the community loses the benefits it would have received were the zoning enforced.<sup>25</sup>

Part I discusses the current law of partial regulatory takings and the criticisms which may have led to property rights advocates' push for a legislative solution. Part II looks at the different legislative solutions. Part III examines how personal and transferable waivers attempt to satisfy property rights advocates' call for "fair" compensation for partial regulatory takings, and how such waivers affect the government's ability to enact land use planning laws. This Comment considers the pragmatic issue of how development may proceed *after* the law is in place, and how it would differ under a personal or transferable waiver scheme. Part IV argues that waivers could benefit the landowner but also harm the surrounding community. Transferable waivers are more permanent as to the land, and run the risk of providing a landowner with a benefit that is actually greater than the amount lost due to the regulation.<sup>26</sup> Personal waivers, on the other hand, satisfy a majority of the concerns that property rights advocates hold regarding partial regulatory takings without the permanence of transferable waivers.<sup>27</sup> This Comment concludes that when considering proposals to provide compensation for partial regulatory takings, states should enact measures with specific provisions for personal waivers.

## I. PARTIAL REGULATORY TAKINGS LAW AND CRITICISMS OF CURRENT REMEDIES

Under current common and federal law, the government compensates partial regulatory takings only under rare circumstances.<sup>28</sup> The issue of regulatory takings received a great deal of public and political attention following *Kelo v. City of New London* in 2005,<sup>29</sup> propelled by public dissatisfaction with the Supreme Court's decision and by property rights advocates' aggressive push for reform.<sup>30</sup> Because federal judicial remedies dis-

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<sup>25</sup> See *infra* Part IV.A.

<sup>26</sup> See *infra* Part IV.A.

<sup>27</sup> See *infra* Part IV.B.

<sup>28</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992) (noting that only in "relatively rare situations [has] the government . . . deprived a landowner of all economically beneficial uses").

[The Court recognizes] at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."].

*Id.* at 1015.

<sup>29</sup> 545 U.S. 469 (2005).

<sup>30</sup> The decision in *Kelo* generated widespread criticism, including a congressional hearing. *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005)*, <http://judiciary.senate.gov/hearing.cfm?id=1612>. Eleven

tinguish between physical takings, which always require compensation, and regulatory takings, which do not necessarily require any compensation,<sup>31</sup> proponents of a legislative solution support it as a method to compensate property owners for full and partial regulatory takings that are otherwise not compensable.<sup>32</sup> In every instance of recently proposed legislation, the measure would provide monetary compensation to a landowner when a regulation diminishes the value of his property.<sup>33</sup> Because of tight state budgets and the vast number of payouts that would be required under such a scheme,<sup>34</sup> it is likely that compensation would be a secondary option to simply waiving the offending regulations. Such waivers would allow the property owner to utilize the property for a use permitted at the time it was purchased (or as otherwise designated in the statute), but the zoning would still be enforced upon other land where owners did not seek or were ineligible for a waiver.

The concept of regulatory takings has its origins, though not direct support,<sup>35</sup> in the constitutional protection of property.<sup>36</sup> The Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

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states responded by voting on eminent domain measures in November 2006; National Conference of State Legislatures, *supra* note 20; *see also* Les Christie, *Kelo's Revenge: Voters Restrict Eminent Domain*, CNNMONEY.COM, Nov. 8, 2006, [http://money.cnn.com/2006/11/08/real\\_estate/kelos\\_revenge/index.htm](http://money.cnn.com/2006/11/08/real_estate/kelos_revenge/index.htm).

<sup>31</sup> Compare *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 438 (1982) (holding that any “permanent physical occupation of property” is a taking, even if it has a “minimal economic impact” and ruling that a physical occupation by a relatively small television cable box on the plaintiff’s roof was a taking), *with* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency* 535 U.S. 302, 322 (2002) (“[R]egulatory takings jurisprudence . . . is characterized by ‘essentially ad hoc, factual inquiries,’ designed to allow ‘careful examination and weighing of all the relevant circumstances.’” (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) and *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring))). Epstein criticizes the assumptions that have led to this disparity, noting that the “relaxed approach to regulation skews the incentives for political groups by making one form of state action subject to powerful constitutional control while leaving its close substitutes wholly unregulated.” RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 104 (1985).

<sup>32</sup> *See, e.g.*, BILL MOSHOFSKY, *REGULATORY OVERKILL* 109 (2004).

<sup>33</sup> *See infra* Part II.

<sup>34</sup> *See Tahoe-Sierra*, 535 U.S. at 324 (“Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.”).

<sup>35</sup> “The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose . . . [b]ut the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.” *Id.* at 321-22.

<sup>36</sup> U.S. CONST. amend. V.

public use, without just compensation.”<sup>37</sup> While this protection has traditionally been understood to apply to physical takings,<sup>38</sup> the Supreme Court extended the protection to government action short of a physical taking in *Pennsylvania Coal Co. v. Mahon*, where the Court held that a regulation that “goes too far” will require compensation.<sup>39</sup> Justice Holmes identified the prudential concern that without some defense against regulations “the contract and due process clauses are gone,” and therefore some limitation was necessary.<sup>40</sup>

However, the consequence of this ruling is that a regulation that does *not* go “too far” will *not* require compensation, regardless of the value lost due to the regulation.<sup>41</sup> The Court’s reasoning behind this limitation was pragmatic: the “[g]overnment hardly could go on” if it was forced to pay for every regulation that diminished the value of property.<sup>42</sup> The Court recognized an “average reciprocity of advantage” may justify certain restrictions.<sup>43</sup> In the dissent, Justice Brandeis emphasized this point further, noting that even if a particular regulation burdens a property owner, that individual still benefits from regulation generally.<sup>44</sup> He found this “[r]eciprocity of advantage is an important consideration, and may even be an essential, where the state’s power is exercised for the purpose of conferring benefits upon the property of a neighborhood.”<sup>45</sup> The Court’s position of strongly supporting regulations, but only up to a point, has left subsequent courts struggling to define regulatory takings by satisfying the prudential concerns of the Constitution while maintaining a pragmatic balance that will allow governments to benefit the community through regulation.

#### A. *Current Partial Regulatory Takings Law Has a High Threshold for Determining Whether a Taking Has Occurred*

The question of compensation for partial regulatory takings is overshadowed in current case precedent by the persistent issue of whether a compensable taking has occurred.<sup>46</sup> The current determination of whether a

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<sup>37</sup> *Id.*

<sup>38</sup> *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (“[I]t is . . . clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.”).

<sup>39</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>40</sup> *Id.* at 413.

<sup>41</sup> *Id.* at 413, 415.

<sup>42</sup> *Id.* at 413.

<sup>43</sup> *Id.* at 415.

<sup>44</sup> *Id.* at 422 (Brandeis, J., dissenting).

<sup>45</sup> *Pa. Coal Co.*, 260 U.S. at 422 (Brandeis, J., dissenting).

<sup>46</sup> *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 n.17 (2002) (“In determining whether government action affecting property is an unconstitutional deprivation

taking has occurred is a balancing test, articulated in *Penn Central Transportation Co. v. New York*.<sup>47</sup> The Court weighed the investment-backed expectations of the landowner impacted by the regulation against the “character of the governmental action” and its level of physical intrusiveness.<sup>48</sup> More recently, in *Lucas v. South Carolina Coastal Council*,<sup>49</sup> the Court held that a regulation denying all economic use would always require compensation.<sup>50</sup> However, if a regulation that denies economic use is for a finite period of time, such as a moratorium on construction, the property owner may not be entitled to compensation of any kind.<sup>51</sup>

While defining regulatory takings remains a relatively convoluted issue, the Court has definitively endorsed the government’s ability to regulate, recognizing the “reciprocity of advantage” provided by regulations as a social good and the government’s ability to regulate as an inherent right.<sup>52</sup> In the seminal case *Village of Euclid v. Ambler Realty Co.*,<sup>53</sup> the Court upheld a zoning plan despite the fact that it caused a 75% reduction in the value of the plaintiff’s land.<sup>54</sup> The Court reasoned that the property rights given to landowners are not absolute as to the state, which retains the power to regulate for the common good.<sup>55</sup> This decision remains a strong argument competing against compensation for regulatory losses that do not meet the threshold of regulatory takings.

#### B. *Taking Issue with the Takings Laws: Where Partial Regulatory Takings Law Falls Short of Property Rights Advocates’ Aspirations*

Property rights advocates have urged expanded rights for property owners in the field of regulatory takings for decades,<sup>56</sup> recently surging due

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of ownership rights under the Just Compensation Clause, a court must interpret the word ‘taken.’ When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.”)

<sup>47</sup> 438 U.S. 104 (1978).

<sup>48</sup> *Id.* at 124.

<sup>49</sup> 505 U.S. 1003 (1992).

<sup>50</sup> *Id.* at 1019, 1027-28. Of course, a mere decrease in the value of property is not a taking.

STEVEN J. EAGLE, REGULATORY TAKINGS § 2-(4)(a)(2) (2d ed. 2001) (“The widening of a country lane into a heavily traveled main road may decrease the value of a roadside cottage, but is not a taking.”).

<sup>51</sup> *Tahoe-Sierra*, 535 U.S. at 347.

<sup>52</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922).

<sup>53</sup> 272 U.S. 365 (1926).

<sup>54</sup> *Id.* at 384.

<sup>55</sup> *Id.* at 387 (“The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.”).

<sup>56</sup> William L. Inden, *Compensation Legislation: Private Property Rights vs. Public Benefits*, 5 DICK. J. ENVTL. L. & POL’Y 119, 120 (1996) (“Private property rights advocates seek to lessen what

to the backlash from the *Kelo* decision.<sup>57</sup> The limitations on (or complete lack of) remedies available to property owners who have been negatively affected by regulation have been wrapped up with efforts to fix eminent domain.<sup>58</sup>

Richard Epstein's views influenced the property rights movement and bolstered the current call for compensation legislation.<sup>59</sup> Rejecting the Court's balance of the pragmatic and prudential concerns in *Mahon*, which resulted in an indefinite line between compensable and non-compensable takings, Epstein asserts that all regulation that impairs property is a taking.<sup>60</sup> He explains:

If a certain form of government action regulates the use of an individual tract of land, as by restrictive covenant or lien, then it is prima facie a partial taking of private property. Where that partial taking is directed toward the land of many persons the generality of the rule is increased, but the nature of its impact upon each affected party remains unchanged. The state may wish to call zoning comprehensive land regulation, but it remains an elaborate network of restrictive covenants imposed upon the regulated land. . . . All regulations . . . are takings of private property prima facie compensable by the state.<sup>61</sup>

This position, popular among property rights advocates, rests on the framework of James Madison's view of property, that "as a man is said to have a right to his property, he may be equally said to have a property in his rights."<sup>62</sup> Thus, if the government zones the land from being used for a certain purpose, that action is equally deserving of compensation as it would

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they consider the unjust burden of natural resource preservation being borne by landowners through the passage of legislation known as 'takings' or 'compensation' bills.").

<sup>57</sup> See *supra* note 30 and sources cited therein.

<sup>58</sup> See *id.*; see, e.g., Idaho Ballot Initiative, Initiative Limiting Eminent Domain When Used For Economic Development, <http://www.idsos.state.id.us/ELECT/INITS/06init08.htm> (last visited Nov. 13, 2007).

<sup>59</sup> See Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 344 (2004) ("The intellectual push for the property rights movement came from Richard Epstein, a University of Chicago professor who . . . published a book recommending that the takings clause be used as a tool to defeat government regulation." (citation omitted)); Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 798 (noting that the Court opinion in *Lucas* "cited to a law review article written by University of Chicago law professor Richard Epstein, widely considered the intellectual fountainhead of the property rights movement").

<sup>60</sup> EPSTEIN, *supra* note 31, at 94-95 ("[N]o matter what the form of a legal command, its impact falls on individual persons. The rules that govern takings from single individuals govern takings from the multitude. . . . The method of analysis does not change when the takings are partial instead of total.").

<sup>61</sup> *Id.* at 95; see also *id.* at 102 ("[A]ll regulation, whether or not compensable, falls within the eminent domain clause.").

<sup>62</sup> James Madison, National Gazette, March 29, 1792, reprinted in 1 PHILLIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 598 (1987).

be if restricted by a physical taking.<sup>63</sup> If a regulation disallows 75% of the economic use of one's land, and no compensation is rendered, from the property owner's perspective the government has taken that land just as if it were to physically obtain it, which would indisputably require compensation.<sup>64</sup> Distinguishing between physical and regulatory takings is simply "a distinction without a difference."<sup>65</sup>

Another argument in favor of compensation for partial regulatory takings is that regulations benefit the population as a whole, and it is theoretically unfair to force one person alone to shoulder the cost of the regulations.<sup>66</sup> Justice Black articulated this view in *Armstrong v. United States*, resulting in the creatively named Armstrong Policy.<sup>67</sup> Justice Black explains, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>68</sup> The reason this policy does not end the debate on regulatory takings is that the Court does not define the point at which the burden shifts from the property owner to the public.<sup>69</sup> Precedent puts the Armstrong Policy's "fairness and justice" limit at one extreme: compensation is required only after all economic value of the land has been taken away.<sup>70</sup> Property rights advocates argue that "fairness and justice" can only be achieved if the limit is at the other extreme: compensation is required for any diminished value of the land.<sup>71</sup>

In addition to the definitional barriers that preclude compensation for partial regulatory takings, procedural hurdles also make it difficult for a property owner to seek remedies through the current judicial process, even if they are owed compensation in theory. The current law of regulatory takings has been called "famously incoherent,"<sup>72</sup> making it difficult to rely on

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<sup>63</sup> EPSTEIN, *supra* note 31 at 95-96.

<sup>64</sup> *Id.*

<sup>65</sup> MOSHOFSKY, *supra* note 32, at 30.

<sup>66</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Lawrence Berger, *Public Use, Substantive Due Process, and Takings—An Integration*, 74 NEB. L. REV. 843, 858 (1995) ("Solving the riddle of when 'fairness and justice' require that society rather than the individual should bear the cost of government impositions has proved to be one of the most difficult questions the Court has ever had to face.").

<sup>70</sup> *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (reinforcing the proposition that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

<sup>71</sup> *See, e.g., MOSHOFSKY, supra* note 32, at 109.

<sup>72</sup> Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 1 (2003) (citing Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 n.2 (1993) (compiling descriptions of the doctrine's incoherence)).

the existing law when deciding to put forth a claim. Establishing a claim also requires demonstrating ripeness, but the ripeness requirements for a regulatory takings claim have been criticized for “[making] it impossible for landowners of ordinary means to vindicate whatever rights in property they may have against oppressive regulatory regimes.”<sup>73</sup> Even when a court does find a compensable taking and awards compensation to the landowner, some critics believe that the trend in regulatory takings cases is toward “unjust, meager compensations.”<sup>74</sup> Courts apply their calculations on a case-by-case basis and critics argue that these calculations generally do not consider the full loss to the owner, which often goes beyond the fair market value of the land.<sup>75</sup>

Under current law, if a taking is established, the goal in theory is to put the property owner in as good a position as before—on this solution the property rights advocates can agree. But they see the test for whether a taking has occurred as far too stringent, because in the majority of cases where the value of land is diminished by regulation, courts refuse to qualify such actions as “takings.”<sup>76</sup> Knowing that judicial remedies will not meet the standard of fairness held by property rights advocates, they took their case to the voters in order to change the way a taking is defined.<sup>77</sup> The goal of making the property owner “whole” is the same whether through judicial or legislative means.<sup>78</sup>

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<sup>73</sup> James S. Burling, *A Short History of Regulatory Takings—Where We Have Been and What Are The Hot Issues of Today*, SL012 A.L.I. A.B.A. 1, 16 (2005); see also Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL’Y 99 (2000) (discussing the state of the ripeness doctrine in takings cases).

<sup>74</sup> Michael DeBow, *Unjust Competition: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995) reprinted in REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 58-59 (Roger Clegg, ed.) (1994); cf. Cynthia J. Barnes, *Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in Wheeler v. City of Pleasant Grove*, 74 IOWA L. REV. 1243, 1245 (1989) (concluding that “the market rate of return measure of damages used in *Wheeler* is an insufficient remedy to justly compensate landowners”).

<sup>75</sup> Barnes, *supra* note 74, at 1252 (discussing approaches to determination of damages, including rental return, option price, interest on lost profits, and before-and-after value).

<sup>76</sup> *Id.*

<sup>77</sup> A number of states passed statutes similar to Measure 37 in November of 2006: Arizona Initiative Measure Proposition 207, [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf) (last visited Nov. 13, 2007) (codified at ARIZ. REV. STAT. §§ 12-1131 to 1138 (LexisNexis 2007)); California Initiative Constitutional Amendment, Proposition 90, [http://www.ss.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_90/entire\\_prop90.pdf](http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf) (last visited Nov. 13, 2007); Idaho Ballot Initiative, Initiative Limiting Eminent Domain When Used For Economic Development, <http://www.idsos.state.id.us/ELECT/INITIS/06init08.htm> (last visited Nov. 13, 2007); and Washington Initiative Measure No. 933, <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf> (last visited Nov. 13, 2007).

<sup>78</sup> In addition to making the property owner whole, an added benefit that comports with the goals of the property rights movement is that such measures will make regulators more careful. Berger, *supra* note 69, at 862. This goal was integrated into the statute proposed in Washington in 2006 which required that the government “consider and document” the effect on private property before passing any

## II. DEVELOPMENT OF PARTIAL REGULATORY TAKINGS COMPENSATION LEGISLATION AS A SOLUTION FOR LOSS OF PROPERTY RIGHTS

Although the recent wave of measures voted on in 2004 and 2006 are the most generous to landowners, prior efforts in other states attempted to achieve a fair outcome for regulated property owners.<sup>79</sup> Statutes passed in the mid-1990s in Florida, Louisiana, Texas and Mississippi require that landowners receive compensation if the regulation decreases the value of specified types of property by a threshold percentage.<sup>80</sup> Florida passed an act in 1995 to compensate property owners for government actions that inordinately burden property,<sup>81</sup> a lower threshold than the full economic taking required under federal law.<sup>82</sup> However, the landowner is compensated only if the regulation's impact is 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."<sup>83</sup> In Louisiana, compensation is due if the regulation devalues agricultural property by 20% or more.<sup>84</sup> Texas has a threshold of a 25% decrease in the value of property before a takings claim may be compensated.<sup>85</sup> In Mississippi, the statute only applies to regulations affecting agricultural or forest land that cause a 40% or greater loss in value.<sup>86</sup>

These measures answer many of the concerns property rights advocates have with the federal interpretation by providing a process that eases the procedural difficulties and providing compensation when it would not be owed under common law. However, the measures still have limitations regarding the point at which compensation is owed, leaving some landowners' losses unsatisfied. This limited applicability dampens the impact they have relative to the recent wave of statutes which are far more comprehensive.<sup>87</sup>

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new ordinance, regulation or rule. Washington Initiative Measure No. 933, § 2 <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf>.

<sup>79</sup> See George Charles Homsy, Comment, *The Land Use Planning Impacts of Moving "Partial Takings" from Political Theory to Legal Reality*, 37 URB. LAW. 269, 278-79 (2005).

<sup>80</sup> *Id.*

<sup>81</sup> "[A]n 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(1)(b) (West 2006). For a detailed look at the effects the Florida statute has had on planning, see Homsy, *supra* note 79, at 281-96.

<sup>82</sup> Homsy, *supra* note 79, at 270 ("The Act provides compensation when a regulation inordinately burdens private property, even if the burden falls short of a total taking under state or federal definitions.").

<sup>83</sup> FLA. STAT. ANN. § 70.001(3)(e) (West 2006).

<sup>84</sup> LA. REV. STAT. ANN. § 3:3610(D) (West 2003).

<sup>85</sup> TEX. GOV'T CODE ANN. § 2007.002(5)(B)(i)-(ii) (Vernon 2006).

<sup>86</sup> MISS. CODE ANN. § 49-33-3 (West 2006).

<sup>87</sup> See *infra* Part II.A-C.

The current trend of partial regulatory takings statutes started with Oregon's successful passage of Measure 37 in 2004.<sup>88</sup> At that time, Oregon was the first state to pass a partial regulatory takings compensation measure with no *de minimis* threshold. Oregonians in Action, a non-profit group focused on property rights,<sup>89</sup> originally passed a ballot initiative on regulatory takings in 2000,<sup>90</sup> but courts struck it down before it could be put into effect for unlawfully affecting more than one section of the Oregon constitution.<sup>91</sup> Switching strategies to a statutory approach, proponents followed up with Measure 37.<sup>92</sup> It passed by 61% of the vote,<sup>93</sup> and after being struck down initially by a district court, the Oregon Supreme Court upheld it.<sup>94</sup>

Some observers speculate that Measure 37 passed because property owners pushed back against the restrictive and unpredictable land use system that developed in Oregon over the past thirty years.<sup>95</sup> In the 1970s, Oregon enacted some of the most stringent and progressive land use laws, with the goals of preserving green space and controlling urban sprawl.<sup>96</sup> But population growth and a shift away from an agriculturally dominant economy led to changes that were unanticipated at the time the plans were made.<sup>97</sup> Still, Oregonians repeatedly rejected direct efforts to scale back the regulatory land use scheme that put their property values at risk initially.<sup>98</sup> When it came time to vote on Measure 37 the voters supported it strongly,<sup>99</sup> possibly indicating that Oregonians wanted progressive land use laws but

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<sup>88</sup> David J. Hunnicutt, *Oregon Land-Use Regulation and Ballot Measure 37: Newton's Third Law at Work*, 36 ENVTL. L. 25, 26, 39 (2006).

<sup>89</sup> Oregonians In Action describes itself as "a statewide, non-profit organization devoted solely to fighting for property rights and against excessive land use regulations." Oregonians in Action, Background Information, <http://www.oia.org/oia2.html> (last visited Nov. 13, 2007).

<sup>90</sup> Hunnicutt, *supra* note 88, at 37.

<sup>91</sup> *Id.* at 38-39.

<sup>92</sup> *Id.* at 39.

<sup>93</sup> Oregon Department of Land Conservation and Development, History of the Program, <http://www.oregon.gov/LCD/history.shtml> (last visited Nov. 13, 2007).

<sup>94</sup> MacPherson v. Dep't of Admin. Servs., 130 P.3d 308, 311-12 (Or. 2006).

<sup>95</sup> E.g., Sara C. Galvan, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL'Y REV. 587, 598 (2005) (suggesting that a "shifting economy and population growth" led to a population too distant from the previous land use plan passed in the 1970's to relate to the stringent requirements); Van Vactor, *supra* note 4, at 225 (suggesting that in addition to economic issues, the legal response to landowners was "inadequate," due to the inconsistencies of the Oregon Supreme Court in deciding takings cases and applying remedies that "heavily favored local governments.").

<sup>96</sup> Van Vactor, *supra* note 4 ("Current statewide planning goals include economic development, natural resource preservation, citizen participation, and protection of farm lands.").

<sup>97</sup> Galvan, *supra* note 95, at 597.

<sup>98</sup> Oregon voters rejected attempts to abolish the state's planning program in 1976, 1978, and 1980. Van Vactor, *supra* note 4, at 225.

<sup>99</sup> Oregon Department of Land Conservation and Development, History of the Program, *supra* note 93.

were attracted to the “fairness” that Measure 37 promised to bring to the process.<sup>100</sup>

The “fairness” promised by Measure 37 was straightforward with few limitations compared to partial regulatory takings statutes passed elsewhere in the mid-1990s.<sup>101</sup> Measure 37 provides that a public entity<sup>102</sup> “that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property” must compensate the landowner.<sup>103</sup> Compensation is calculated as the difference between the “fair market value” of the property with and without the regulation.<sup>104</sup> Alternatively, the entity enacting the regulation may choose to “remove, or not to apply the land use regulation,” thus allowing the property owner to “use the property for a use permitted at the time the owner acquired the property.”<sup>105</sup>

In 2006 voters considered similar measures in four states.<sup>106</sup> Of those, only Arizona passed the measure, while California, Idaho, and Washington voters defeated similar ballot initiatives.<sup>107</sup> Comparable measures were also proposed in Montana and Nevada but were precluded from the ballot for procedural failings.<sup>108</sup> Property rights advocates and libertarian groups supported the measures strongly in all the states as a means to force governments to pay for restricting a landowner’s use of his own property.<sup>109</sup> The

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<sup>100</sup> In campaigns in 2006, a common and perhaps effective theme highlighted the impossibility of both having a land use plan enacted by the government and compensating every landowner each time property values went down. *See, e.g.,* Mary Zeiss Stange, *Life, Liberty and Property Rights: Six State Initiatives in the West Aim to Ride the Wave of Public Sentiment Against Government Seizures of Private Property, Sounds like a Winner? Well, Better Read the Fine Print*, USA TODAY, Nov. 2, 2006, at A13, available at [http://blogs.usatoday.com/oped/2006/11/post\\_7.html](http://blogs.usatoday.com/oped/2006/11/post_7.html); *Prop 207 Has Local Officials Worried*, ARIZ. DAILY SUN, Oct. 20, 2006, available at [http://www.azdailysun.com/articles/2006/10/20/news/20061020\\_news\\_22.txt](http://www.azdailysun.com/articles/2006/10/20/news/20061020_news_22.txt) (“[L]ocal governments would choose not to plan at all rather than face bankruptcy, some officials and planners contend.”).

<sup>101</sup> *See supra* notes 79-86 and accompanying text.

<sup>102</sup> Defined as including “the state, a metropolitan service district, a city, or a county.” OR. REV. STAT. ANN. § 197.352(11)(D) (West 2005).

<sup>103</sup> § 197.352(1).

<sup>104</sup> § 197.352(2).

<sup>105</sup> § 197.352(8).

<sup>106</sup> *See supra* note 77.

<sup>107</sup> National Conference of State Legislatures, *supra* note 20.

<sup>108</sup> *Id.* Montana’s measure was blocked by the courts due to allegations of fraud in the signature-gathering process (though the measure itself remained on the printed ballots), and Nevada’s regulatory takings portion was blocked for violation of the state’s single-issue rule for constitutional amendments. *Id.* Nevada voted on and passed an eminent domain measure. *Id.*

<sup>109</sup> *See, e.g.,* Americans for Limited Government, *Protecting Property Rights Across the Country*, <http://www.getliberty.org/campaigns/propertyrights/index.php> (last visited Dec. 4, 2007) (“Americans for Limited Government is working with state groups in Arizona, California, Idaho, Michigan, Montana, Nevada, North Dakota, and Washington to protect property rights. These local initiatives address the growing problem of unjust government takings, whether they are through eminent domain abuse or

remedies proposed fall into four separate approaches that are discussed below.

A. *Transferable Waivers and the Creation of the “Super-Parcel”*

If the goal is a compensation solution that puts the property owner in as good a position as before the regulation was passed, transferable waivers accomplish this goal most literally. Transferable waivers remove the regulation as it applies to the property owner’s affected parcel, and are conveyable to subsequent owners of the property.<sup>110</sup> Past Supreme Court holdings and dicta arguably support that a waiver would be conveyable if such a waiver could be provided. The Supreme Court has said that “[t]he value compensable under the Fifth Amendment . . . is only that value which is capable of transfer from owner to owner.”<sup>111</sup> Furthermore, “just compensation, it will be noticed, is for the property, and not to the owner.”<sup>112</sup> Transferable waivers align with the understanding that a remedy in a compensable regulatory takings case will apply to the land, not to the current owner.

Both Montana and Arizona’s ballot initiatives made it clear that waivers, if granted, would be transferable. In Arizona, the only partial regulatory takings measure to pass in 2006, the statutory amendment gives the landowner a “cause of action for just compensation . . . unless this state or political subdivision of this state amends, repeals, or issues to the landowner a binding waiver of enforcement of the land use law on the owner’s specific parcel.”<sup>113</sup> The amendment goes on to specify, “[a]ny demand for landowner relief or any waiver that is granted in lieu of compensation runs with the land,” making it clear that a waiver is transferable to the subsequent purchaser.<sup>114</sup> Montana’s proposed constitutional amendment requires the government body receiving a landowner’s claim for relief from regulation to “take final action to permanently waive the regulation as applied to the affected parcel, retract the regulation or pay just compensation.”<sup>115</sup> Specifying that the waiver applies to the “affected parcel,” not the property owner demonstrates the intent that the waiver runs with the land.

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through excessive regulation.”); Oregonians In Action, Measure 37, <http://measure37.com/> (last visited Nov. 13, 2007).

<sup>110</sup> See *infra* note 117.

<sup>111</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

<sup>112</sup> *Monongahela Navigation Co v. United States*, 148 U.S. 312, 326 (1893).

<sup>113</sup> Arizona Initiative Measure Proposition 207, [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf) (last visited Nov. 13, 2007) (codified at ARIZ. REV. STAT. ANN. § 12-1134(E) (2007)).

<sup>114</sup> ARIZ. REV. STAT. ANN. § 12-1134(F) (2007).

<sup>115</sup> Montana Secretary of State, 2006 Ballot Issue, Montana Ballot Issue I-152, <http://sos.state.mt.us/elb/archives/2006/I/I-152.asp> (last visited Nov. 13, 2007).

Transferable waivers are the most threatening to land use regulations.<sup>116</sup> All the rights the property owner had before the regulation are returned, and he may convey the land to subsequent owners.<sup>117</sup> These waivers would exempt future landowners from subsequent regulations, privileged to own property for which all future regulations may be waived. Like a resistant strain of bacteria, the parcel of land in question would become a “super-parcel,” immune to any governmental regulation.

This scenario is not necessarily the intention of all transferable waiver proponents, who may simply want the government to pay for regulation. However, the government would either have to pay for the regulation up front, rather than granting a waiver, or be prepared to purchase the rights in the future, if a waiver had been granted already. The measures do not provide or designate specific funding to carry out the compensation and assuming the outcome in Oregon is a general illustration of how states will behave, compensation is likely to be the exception and waivers will be the norm.<sup>118</sup>

The indefinite ability to develop a super-parcel under a transferable waiver may be harmful to neighbors who come to rely on enacted zoning. If the land could be developed at any time and by any owner once the waiver is granted, neighbors will always face the uncertainty that nearby land may be converted into some use not currently implemented. For example, a vintner in Oregon may have purchased farmland to grow grapes and produce wine. The process is sometimes dusty and loud, but the surrounding land has also been regulated for agricultural use. However, if his neighbor obtains a Measure 37 waiver that is transferable, at any point the land next to the vineyard could be developed into housing.<sup>119</sup> What was once a hassle-free pastoral venture may turn into a legal battle to continue to use his land for the purpose for which it was regulated.

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<sup>116</sup> See *infra* Part IV.A.

<sup>117</sup> See, e.g., ARIZ. REV. STAT. ANN. § 12-1134(F) (2007) (creating a right of entitlement to the owner of property for “just compensation” if “the existing rights to use, divide, sell, or possess private real property are reduced by . . . any land use law” and noting specifically that “any demand for landowner relief or any waiver that is granted in lieu of compensation runs with the land.”).

<sup>118</sup> Only one monetary settlement has occurred in the entire state; the city of Prineville negotiated a settlement of \$180,000 (approximately 4% of the city’s general fund) to keep landowners from building atop the city’s distinct rimrock skyline. Mary Kitch, *The Riddle of the Rimrock*, THE OREGONIAN, Oct. 14, 2007, at F1, available at <http://www.oregonlive.com/editorials/oregonian/index.ssf?/base/editorial/119213430832190.xml&coll=7>. For a tally of Measure 37 claims filed by county and by proposed use, see The Institute of Portland Metropolitan Studies, Measure 37: Database Development and Analysis Project, <http://www.pdx.edu/ims/m37database.html> (last visited Nov. 13, 2007).

<sup>119</sup> Gregory Roberts, *Oregon Could Foretell Our Land-Use Destiny: Sprawl, Chaos, Justice? Clues Lay in '04 Property-Rights Win*, SEATTLE POST-INTELLIGENCER, Nov. 1, 2006, at A1, available at 2006 WLNR 18994765.

A similar argument was raised in *MacPherson v. Department of Administrative Services*<sup>120</sup> against Measure 37 in general before the debate of personal versus transferable waivers arose.<sup>121</sup> The outcome of the case, which upheld Measure 37, may have been different if Measure 37 specified transferable waivers, as the harm alleged would be aggravated by the indefinite ability to develop.<sup>122</sup> The plaintiffs in *MacPherson* alleged, inter alia, that Measure 37 was a violation of a *nonclaimant* property owner's Fourteenth Amendment procedural due process.<sup>123</sup> Plaintiff David Adams was a homeowner whose neighbor filed a Measure 37 claim.<sup>124</sup> The neighbor was granted a waiver, allowing him to subdivide his property and develop housing.<sup>125</sup> Adams alleged that if his neighbor went forward with the development, he would be harmed in multiple ways: the water available to his property through the well system would be diminished in quality and quantity; the development would increase traffic and pollution in the neighborhood; and Adams would be responsible for an increased tax burden as a result of additional students attending the local school.<sup>126</sup>

The trial court struck down Measure 37, finding it violated the procedural due process rights of Measure 37 claimants' neighbors, who would be adversely affected if a waiver were granted.<sup>127</sup> The trial court held that "because nearby property owners may suffer 'irreparable harm' as a result of a governmental decision to modify, remove, or not apply a land use regulation, property owners so affected 'must be given notice and an opportunity to be heard *before* a public entity decides the Measure 37 claim.'"<sup>128</sup> The Oregon Supreme Court reversed and upheld the measure, criticizing the trial court for "ask[ing] more of Measure 37 than the measure was required to deliver."<sup>129</sup> While the measure itself does not provide pre-deprivational procedures, "it does not follow that the omission renders Measure 37 unconstitutional under the Fourteenth Amendment."<sup>130</sup> Even though the Oregon Supreme Court did not find a due process violation, the negative effect

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<sup>120</sup> 130 P.3d 308 (Or. 2006).

<sup>121</sup> *Id.* at 312-13.

<sup>122</sup> *Id.* at 322.

<sup>123</sup> *Id.* at 320. Other arguments made against Measure 37's constitutionality, which were also rejected by the Oregon Supreme Court, were that the measure: impermissibly intruded on the legislature's plenary power; violated the equal privileges and immunities guarantee of the Oregon constitution; impermissibly suspended the laws in violation of the Oregon constitution; violated the separation of powers principles in the Oregon constitution; intruded on executive power and fails to provide adequate safeguards to prevent improper use of the power conferred; and was an impermissible waiver of sovereign immunity. *Id.* at 322.

<sup>124</sup> *Id.* at 313.

<sup>125</sup> *Id.*

<sup>126</sup> *MacPherson*, 130 P.3d at 313.

<sup>127</sup> *Id.* at 312.

<sup>128</sup> *Id.* at 320-21.

<sup>129</sup> *Id.* at 321.

<sup>130</sup> *Id.*

on neighbors that concerned the trial court would be aggravated in a state that enacted transferable waivers.

### B. *Personal Waivers*

Personal waivers are granted to the current property owner, but are not conveyable to subsequent owners.<sup>131</sup> The current owner of the property has a claim against new regulation that diminishes the value of the land. If a personal waiver is granted the owner is free to use the property for any purpose available before the enforcement of the regulation.<sup>132</sup> However, if the owner sells the undeveloped property to a subsequent owner, the waiver is extinguished upon the conveyance of property. At that point, the regulation becomes permanently enforceable.<sup>133</sup> The subsequent owner, having purchased the property with notice of the regulation, may not make a regulatory takings claim against previous regulations.<sup>134</sup> No ballot measure has specified that the waiver granted will be a personal waiver, which is understandable considering the fact that property rights advocates sponsor and write the ballot initiatives.<sup>135</sup> Although not by design,<sup>136</sup> Oregon's Measure 37 was originally interpreted, when the question finally arose, as having waivers that were personal to the current owner.<sup>137</sup>

This interpretation developed because the language of Measure 37 did not address whether a waiver is a part of the real property, or whether it is a personal right granted solely to the current property owner.<sup>138</sup> The uncertainty surrounding this issue caused problems for property owners, most importantly because financial backers were unwilling to invest in development projects with such uncertain legal futures.<sup>139</sup> The Oregon Attorney General and the first trial court decision to address the issue came to the conclusion that Measure 37 grants personal waivers by interpreting voter

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<sup>131</sup> See *Crook County Decision*, *supra* note 12, at 11.

<sup>132</sup> Enforcement of the regulation is required before hardship is experienced, because it is possible for a regulation to be passed at the state level, but not enforced by the local government. The possibility of compensation under a system like Oregon's Measure 37 arises only once a particular regulation is enforced. See OR. REV. STAT. ANN. § 197.352(2) (West 2005).

<sup>133</sup> If the regulation is onerous to the point of a Fifth Amendment taking, the subsequent owner may seek relief under the Fifth Amendment. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

<sup>134</sup> OR. REV. STAT. ANN. § 197.352(1) (West 2005).

<sup>135</sup> See, e.g., *Oregonians in Action*, <http://www.oia.org> (last visited Nov. 13, 2007).

<sup>136</sup> *Oregonians in Action*, *Frequently Asked Questions*, *supra* note 13 (maintaining, as the group that authored the measure, that waivers are transferable).

<sup>137</sup> See *supra* note 12 and sources cited therein.

<sup>138</sup> The Oregon Supreme Court found Measure 37 constitutional, but did not address whether waivers are transferable. *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 322 (Or. 2006).

<sup>139</sup> E.g., *Crook County Decision*, *supra* note 12, at 3.

intent.<sup>140</sup> Oregonians in Action, the organization responsible for the text of the law, insisted that it was intended to create transferable waivers.<sup>141</sup>

While personal waivers were controversial for Oregon, they are nevertheless a legitimate policy option for partial regulatory takings statutes that ultimately may serve as a compromise between fairness to property owners and the social benefit of land use planning.<sup>142</sup> Blunting the effect of statutes like Measure 37 by restricting the waivers only to people who actually develop the land ensures against claims that are purely speculative and may protect land regulations from the rapid erosion feared by opponents of partial regulatory takings compensation measures.<sup>143</sup>

In states with a rich history of land regulation, the option of personal waivers expressly written into statutes would cause the least disruption to the existing land use regulations. For example, in Oregon, a state with extensive land use planning in place,<sup>144</sup> a shorter shelf-life for waivers may be desirable so that the government is able to continue with its land use plans, and that previous plans are not unraveled entirely. Personal waivers would ensure that the regulations will in fact take effect on the whole, rather than facing a series of transferable waivers granted directly after passage of the new regulation. Such transferable waivers would cause the regulations to sit in legal limbo for an indefinite period of time as the property gets passed on to different potential developers. A personal waiver would also assist third parties (i.e., neighbors) whose own property and interests would be affected when and if a waiver is executed, and who would be harmed by excessive uncertainty.<sup>145</sup> Because personal waivers are less popular with the typical proponents of regulatory compensation measures,<sup>146</sup> state legislatures could strategically choose to pass a measure providing for personal waivers precluding a popular backlash with a stronger result.

Development of property is of course still viable under personal waivers. The current property owner may obtain a waiver allowing him to use the land for any purpose that was available prior to the regulation.<sup>147</sup> There

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<sup>140</sup> *Attorney General's Letter*, *supra* note 12, at 3-7; *Crook County Decision*, *supra* note 12, at 10-12.

<sup>141</sup> See *Oregonians in Action*, *supra* note 13.

<sup>142</sup> See MacLaren, *supra* note 23, at 71-74 (recognizing the need for compromise but finding a different solution).

<sup>143</sup> One group strongly opposed to Measure 37, "1,000 Friends of Oregon," calls the measure "an unfunded mandate with one clear objective: to rollback Oregon's basic zoning protections." 1,000 FRIENDS OF OREGON, MEASURE 37 AND YOU: WHAT CAN YOU DO? 15 (2006), [http://www.friends.org/issues/m37/Measure\\_37\\_and\\_You\\_20060517.pdf](http://www.friends.org/issues/m37/Measure_37_and_You_20060517.pdf).

<sup>144</sup> See *supra* note 96 and accompanying text.

<sup>145</sup> See *supra* Part II.A.

<sup>146</sup> See *supra* note 109.

<sup>147</sup> In Oregon, this application is retrospective to the date the owner acquired the property. OR. REV. STAT. ANN. § 197.352(8), (10) (West 2005). Other states may choose to apply personal waivers as prospective only, as Arizona did. ARIZ. REV. STAT. ANN. § 12-1134(B) (2007).

is no time limit on the waiver's use, though once the land is conveyed, the waiver disappears and the zoning is enacted.<sup>148</sup> The waiver disappears even if the property owner develops the land before conveying the property, because the land was only exempt from the regulation as to that owner. However, developed property still may be conveyed as a vested nonconforming use.<sup>149</sup> Unlike transferable waivers, which may be conveyed with the property until it is beneficial to develop, personal waivers by definition allow only the current property owner to develop the land. This means that the waiver may not be attached to the land in anticipation of a market change that would make the development profitable, resulting in the potential problem that the land might not be used to its greatest advantage, or be conveyed to the person who values the land most.

From the perspective of the current property owner, this does not change his prospects much; presumably, if the land was not developable a potential buyer would not pay a higher price for it with or without a waiver, and the property owner's loss is not dramatic. The property rights of the landowner are in part restored, though not entirely. Possible solutions for development of the land with personal waivers are considered below.<sup>150</sup>

### C. *Monetary Compensation Only*

The form of compensation available under common law is monetary compensation for the value of property the property owner lost.<sup>151</sup> Several legislative plans offer the possibility of monetary compensation in addition to waivers,<sup>152</sup> but given the limited budgets of state and local governments, monetary compensation for a widespread action impacting a large number of citizens is a politically difficult solution to sell as feasible. It is therefore understandable that even when state law provides for compensation, states will likely opt for using waivers instead.

Two states, Idaho and California, provided only monetary compensation as a remedy in their proposed measures in 2006.<sup>153</sup> California's proposition would have required that if a regulation damaged property, the landowner would receive "just compensation," defined as "that sum of money

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<sup>148</sup> See, e.g., *In re Forsman*, D.L.C.D. M120533, ¶ 3 (2005) (final order), [http://www.oregon.gov/LCD/docs/measure37/finalreports/M120533\\_Forsman\\_Final\\_Order.pdf](http://www.oregon.gov/LCD/docs/measure37/finalreports/M120533_Forsman_Final_Order.pdf).

<sup>149</sup> See *Crook County Decision*, *supra* note 12, at 11 (noting that historically a landowner whose development to the land is later regulated against may pass the nonconforming use to a subsequent owner, having "engaged in substantial effort" or made "substantial investment," and noting that the determination would be made on a case-by-case basis to land developed under a personal waiver and then conveyed).

<sup>150</sup> See *infra* Part IV.B

<sup>151</sup> See *supra* Part I.A.

<sup>152</sup> National Conference of State Legislatures, *supra* note 20.

<sup>153</sup> Both propositions failed. *Id.*

necessary to place the property owner in the same position monetarily . . . as if the property had never been taken.”<sup>154</sup> Idaho’s proposition also would have required just compensation “[i]f an owner’s ability to use, possess, sell or divide private real property is limited or prohibited by the enactment or enforcement of any land use law . . . in a manner that reduces the fair market value of the property.”<sup>155</sup> The Idaho measure defined just compensation as “equal to the reduction in the fair market value of the property resulting from enactment or enforcement of the land use law.”<sup>156</sup> While both California and Idaho’s proposed amendments would have expanded existing rights within their constitutional and statutory schemes, California also would have expanded the compensation due, as the amended language requires that the property owner be put in the “same position monetarily.”<sup>157</sup> However, California’s proposal required compensation only for “substantial economic losses,” which would result in fewer instances of required compensation than under a regulatory scheme without such a restriction.<sup>158</sup>

Both California and Idaho’s measures would have applied prospectively, and therefore would not impact existing land use regulations directly.<sup>159</sup> They could, however, have a chilling effect on future regulations, because if the local government does not have the funding to pay out the claims as a result of the regulation, it may choose not to enforce the regulation at all. In Oregon, where the measure has a limited retroactive application and the government has the option of both waivers and compensation, out of over 7,500<sup>160</sup> claims, only one has been settled with compensation.<sup>161</sup> Because local and state governments were not given additional funding to settle anticipated claims,<sup>162</sup> and because the claims must be satisfied within the timeframe set out in the statute,<sup>163</sup> the governments have little choice but to waive the regulations. Thus, the retroactive application of Measure 37 has compounded Oregon’s problem of compliance. But even if a proposed statute is prospective, like those of Idaho and California, compensation-

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<sup>154</sup> California Initiative Constitutional Amendment, Proposition 90, at 188, [http://www.ss.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_90/entire\\_prop90.pdf](http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf) (last visited Nov. 13, 2007).

<sup>155</sup> Idaho Ballot Initiative, Initiative Limiting Eminent Domain When Used for Economic Development (2006), <http://www.idsos.state.id.us/ELECT/INITS/06init08.htm> (last visited Dec. 4, 2007).

<sup>156</sup> *Id.*

<sup>157</sup> California Initiative Constitutional Amendment, Proposition 90, at 188, [http://www.ss.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_90/entire\\_prop90.pdf](http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf) (last visited Nov. 13, 2007).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*; Idaho Ballot Initiative, Initiative Limiting Eminent Domain When Used for Economic Development (2006), <http://www.idsos.state.id.us/ELECT/INITS/06init08.htm>.

<sup>160</sup> Institute of Portland Metropolitan Studies, *supra* note 118; Institute of Portland Metropolitan Studies, Measure 37: Database Development and Analysis Project, *supra* note 118. Because of the retroactive application, the number of initial claims would necessarily be greater for Oregon than for states with prospective measures. OR. REV. STAT. ANN. § 197.352(8), (10) (West 2005).

<sup>161</sup> Kitch, *supra* note 118.

<sup>162</sup> See OR. REV. STAT. ANN. § 197.352 (West 2005).

<sup>163</sup> See, e.g., OR. REV. STAT. ANN. § 197.352(4) (West 2005).

only states may find that such a provision ties the hands of government regulators<sup>164</sup> to the point that they are unable to regulate—or as Justice Holmes warned, they would be unable to go on.<sup>165</sup>

Even if a statute specified compensation as the only remedy, a government might nevertheless allow waivers to occur at a local level at the discretion of the government enacting the legislation. The Florida act passed in 1995 requires compensation to be provided if the regulation “inordinately burdens private property.”<sup>166</sup> Finding the financial burden to be insurmountable, some municipalities granted themselves the ability to waive regulations in lieu of providing compensation.<sup>167</sup> If history is an indicator, local governments in Idaho and California may not have compensated property owners monetarily, but rather would have found ways to waive regulation.

Assuming states with compensation statutes satisfy claims through monetary compensation, they have the benefit of not disrupting existing zoning or future zoning schemes. Once the property owner is compensated, the regulation takes effect and is enforceable against future owners. This allows the government to zone as it sees fit, as long as it is willing and able to pay landowners for the right to do so. Relative to the possibility of waivers, there are few negative effects on third parties, as zoning would be enacted as planned. However, the necessary diversion of public funds to compensate private landowners may have ripple effects on other services the government provides. There are also potential problems with landowners who are not appeased with mere monetary compensation, but would prefer to be made whole through a waiver and the ability to develop their land.<sup>168</sup> Furthermore, while compensation statutes would expand the remedies available under common law, not all the concerns of critics are met.<sup>169</sup> The problem of meager remedies that fail to take into account the less tangible losses of a landowner may still exist, just as under federal regulatory takings law.<sup>170</sup>

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<sup>164</sup> Apart from the reasons laid out as exceptions, which include public health and safety, general nuisances, and the adult entertainment industry. *Id.*

<sup>165</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>166</sup> Homsy, *supra* note 79, at 270.

<sup>167</sup> *See id.* at 293.

<sup>168</sup> Matthew Preusch, *Prineville Offers Measure 37 Pay*, THE OREGONIAN, Oct. 26, 2006, at A1, <http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/1161833103250130.xml&coll=7> (discussing the rejection of offers, though eventually a monetary settlement was accepted).

<sup>169</sup> *See supra* Part I.A-B.

<sup>170</sup> *See supra* Part I.B.

#### D. *Waivers Defined at the Local Level*

A state may choose to allow waivers, but not specify whether the waivers are transferable or personal, leaving the decision to local governments. Such deference is reflective of the emphasis on local decisions in land use regulations. Washington's initiative<sup>171</sup> provided for waivers but allowed local governments to work out the details. The initiative specified that if an agency applied a regulation that would devalue private property, it "shall first pay the property owner compensation."<sup>172</sup> However, the statute emphasized that this requirement "shall not be construed to limit agencies' ability to waive, or issue variances from, other legal requirements."<sup>173</sup> Because the waivers were not addressed specifically, the format would likely have been created at the city and county level.<sup>174</sup> At that point, the decision between transferable and personal waivers would implicate the same rights for property owners and communities as discussed above.<sup>175</sup>

### III. IMPORTANCE OF DETERMINING FAIRNESS AFTER DEVELOPMENT

Initial fairness to landowners may be the goal of property rights advocates campaigning for regulatory compensation measures,<sup>176</sup> and it may be the sentiment that captures the most votes on a ballot initiative.<sup>177</sup> But it is necessary to examine what happens to this balance of fairness after development goes forward under a waiver, considering that surrounding property is now subject to the regulation. Because the political debate focuses on the goals of protecting either personal property rights or the government's continued ability to regulate, this end result is insufficiently examined in current scholarship.

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<sup>171</sup> Washington's voters rejected this 2006 initiative, and rejected a similar referendum in 1995. National Conference of State Legislatures, *supra* note 20.

<sup>172</sup> Washington Initiative Measure No. 933, <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf> (last visited Nov. 13, 2007). The proposed statute differs from the other statutes voted on in 2006 in that it first requires that the government must "consider and document" the effect on private property before passing any new ordinance, regulation or rule. *Id.* This study must include the governmental purpose and its link to the action, and the impact on the value of private property, including the "fundamental attribute of property ownership" such as the "right to dispose of property." *Id.* The amendment also requires the government to consider "[a]lternative means which are less restrictive on private property." *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See supra* Part II.A-B.

<sup>176</sup> *See, e.g.,* Oregonians In Action, Measure 37, <http://measure37.com/> (last visited Nov. 13, 2007).

<sup>177</sup> For an article on the influence of private interest groups on the results of ballot initiatives, see Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191 (2005).

Whether a waiver granted is personal or transferable will affect the “fairness” a landowner receives. A personal waiver may make the land less valuable than if a waiver could be sold along with it, while a transferable waiver may give the landowner more than was lost at the expense of the community. A balance must be achieved between the fundamentals of fairness to the landowner and the state’s need to regulate for the benefit of the community. On the one hand, the policy intent of a partial regulatory takings statute could be to make the property owner whole by putting him in as good a position as before the regulation was passed, regardless of the cost to the government and community, based on the theory that regulatory takings of any kind deserve compensation.<sup>178</sup> On the other hand, the policy intent could be not only to maintain the benefit to the community provided by zoning and regulation, but also to help some landowners by giving them a remedy that was previously unavailable. After all, as Holmes articulated in *Mahon*, there is a reciprocal benefit to landowners when the government regulates.<sup>179</sup> Contrary to the opinion that the rights to property are absolute, the state arguably has always held certain power over private property. As Immanuel Kant recognized:

Each person must regard all of his acquired rights as derived from the [state], and received only as a result of specific decisions [by] authorities [of the state]. No one simply takes what was his property in a state of nature with him into a civil condition. . . . In the civil condition, all acquired property, land or natural resources, depends on the determination and application of laws by the civil authorities. Land [is] represented as originally the collective possession of everyone through the general will.<sup>180</sup>

Compensation legislation for partial regulatory takings may be put forth as a better solution than the existing process, but the benefits to landowners must be measured against what is owed to them—a question that is difficult to resolve.

The legislation does not purport to put the landowner in a better situation than he was in prior to the regulation.<sup>181</sup> There is no claim that someone should profit by having his land regulated adversely—especially when the taxpayers are responsible for the compensation. Investments in land may be

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<sup>178</sup> See *supra* notes 60-65 and accompanying text.

<sup>179</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>180</sup> Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?*, 31 ARIZ. ST. L.J. 391, 414-15 (1999) (quoting 4 IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE-PART I OF THE METAPHYSICS OF MORALS* 81 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797)).

<sup>181</sup> While the statute proposed in California gives the landowner 125% of the market value of the loss, the goal is to achieve “just compensation,” not over-compensation, and the additional monetary value is a reflection of the understanding that the market value of the land differs from the subjective value to the property owner. California Initiative Constitutional Amendment, Proposition 90, 188, [http://www.ss.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_90/entire\\_prop90.pdf](http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf).

expected to increase in value, but are by no means a guaranteed investment. Some people may get lucky and have their land value increase dramatically; some people get unlucky and suffer the opposite. Like any investment, it is a speculation and the government is not responsible for guaranteeing investor expectations. The purpose of damage awards is “to compensate the injured party for loss resulting from the conduct of the wrongdoer, not to . . . allow plaintiff to recover a windfall.”<sup>182</sup> The Court notes in *United States v. Sponenbarger* that “if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty,” an outcome the Court rejects.<sup>183</sup>

Even in articulating the case for a broader application of the takings clause favoring landowners, Richard Epstein recognizes the reasonable limits that must occur when the taking actually benefits the landowner.<sup>184</sup> He notes that “[p]artial takings from large numbers of persons increase the likelihood (but do not create the certainty) that aggrieved parties will receive implicit in-kind compensation, for there is often overlap between the persons whose property is taken and the persons who are benefited by the takings.”<sup>185</sup>

A broad measure that provides for compensation whenever a regulation affects the value of land fails to take this perspective into account. Allowing for waivers in such a situation may indeed increase the value of the land where the waiver is applied, but the property value is also affected by the regulation itself as applied to the surrounding areas. Epstein notes that monetary compensation would be improper “[w]here adequate in-kind compensation is implicit in the governmental scheme . . . .”<sup>186</sup> With waivers, the remedy itself creates the additional benefit above what is needed to make the property owner whole, which may result in the “improper” compensation.<sup>187</sup>

Both personal and transferable waivers pose the risk of conferring more to the landowner than was lost by the regulation.<sup>188</sup> However, the super-parcel created by transferable waivers potentially gives property owners more and for less effort than the owners would experience without regulation.<sup>189</sup> Personal waivers are more temporary with respect to the land, are less disruptive, and contain certain inherent barriers that ensure that land-

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<sup>182</sup> *Cordeco Dev. Corp v. Vasquez*, 539 F.2d 256, 260-62 (1st Cir. 1976) (internal quotation marks omitted) (replacing a jury’s award of \$50,000 with a nominal amount to compensate for losses resulting from a withheld permit to excavate sand).

<sup>183</sup> *United States v. Sponenbarger*, 308 U.S. 256, 266-67 (1939).

<sup>184</sup> EPSTEIN, *supra* note 31, at 96.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> “[T]hen cash payments are improper even though the [Takings] [C]lause applies.” *Id.*

<sup>188</sup> *See supra* Part II.A-B.

<sup>189</sup> *See supra* Part II.A.

owners who benefit are the ones who would have developed the land. The next section looks at transferable and personal waivers and examines how development may occur under each one.<sup>190</sup>

#### IV. WEIGHING THE IMPACT OF WAIVERS: A NORMATIVE ASSESSMENT

##### A. *Transferable Waivers Give Landowners More Rights Than They Are Owed at the Expense of the Community*

While both transferable waivers and personal waivers permit the landowner to operate the land as he would prior to the enforcement of the regulation, transferable waivers have a greater potential to give the landowner more than he lost and negatively impact the government's ability to zone. While a transferable waiver seems to give the landowner the same rights he had prior to regulation, it does, in fact, convey additional benefits to the detriment of the community by allowing the land to benefit from the regulatory scheme it disrupts.<sup>191</sup>

Courts have articulated that regulatory takings claimants are not entitled to what would amount to duplicative compensation if they also enjoy the benefits of the regulation.<sup>192</sup> Because outside influences such as the amenities in the surrounding area and value of neighboring property also affect property values, and assuming not all landowners choose to apply or are eligible for a waiver,<sup>193</sup> the recipient of a transferable waiver may be getting more than was held prior to the regulation when all relevant factors are considered.<sup>194</sup> To follow the principle of fairness set forth in partial regulatory takings judicial precedent, a property owner should not be given

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<sup>190</sup> The option of having the type of waiver determined on a local level is eliminated from the discussion here, as the substantive issue of rights for the individuals involved will not differ from the impact under a similar statewide scheme for the purposes of this analysis. Other issues that may be implicated in the difference between a uniform state approach and allowing local governments to determine is beyond the scope of this article. "Compensation only" statutes are eliminated from this focused discussion for the same reason, as the possibility of waivers will be addressed, if at all, by the local governments.

<sup>191</sup> See *supra* Part III.

<sup>192</sup> See, e.g., Note, *Condemnations, Implicit Benefits, and Collective Losses: Achieving Just Compensation Through "Community,"* 107 HARV. L. REV. 696, 700 (1994). "If the public project implicitly benefits the condemnee, the actual burden to the condemnee equals the market value of the condemned property plus all non-market-value losses, less the benefits that accrue to him from the government action." *Id.* at 701; see also *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987); EPSTEIN, *supra* note 31, at 195-215.

<sup>193</sup> Some landowners may have acquired the property after the regulation was in force. See also *infra* note 234 (discussing possible tax disincentives for obtaining a waiver, which may discourage landowners from pursuing one).

<sup>194</sup> See *infra* Part IV.A.2-3.

more than was taken.<sup>195</sup> By conferring a transferable waiver, the parcel becomes a super-parcel, endowed with unique benefits and immunity to future regulation indefinitely.<sup>196</sup> Although such an outcome could be enacted by states through legislation it would have negative effects on the community in the long run.

1. Super-Parcels Increase in Value and Harm Neighbors' Expectations

Because the subsequent purchaser of land with a transferable waiver is obtaining a super-parcel free from certain regulations, transferable waivers may even increase the value of property and subsequent development beyond what their value would be had development occurred prior to the regulation.<sup>197</sup> Even if development is not economically feasible at the time of sale, a developer might still pay more for land with a waiver. For instance, a developer might purchase farmland that is too far removed from a city for current development in anticipation of the city growing outwards and eventually reaching the land. With a waiver conveyed by the original owner, the developer's future plans are secure and the developer may pay the original owner more for that guarantee. Even if the land were regulated after the purchase, it could still be developed, as the developer could obtain a waiver from the new regulation as the new owner.<sup>198</sup>

Immunity from regulation has an added negative impact on third party expectations. Neighbors would be unable to rely on regulations for their own development or other plans, as their expectations could be thwarted at any time development on the super-parcel progressed.<sup>199</sup>

2. Transferable Waivers Allow the Property to Free-Ride on the Community Amenities at a Cost to Neighboring Properties

Waivers from regulation, when surrounding property remains subject to regulation, increase the value of the property exempted. Super-parcels created by transferable waivers exacerbate the problem of over-compensation. William Jaeger emphasizes the relationship between zoning

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<sup>195</sup> See *supra* Part III.

<sup>196</sup> As noted before, the government will usually have the option of paying for the regulation instead of granting a waiver, or purchasing the rights back from the owner later. See *supra* Part II.A.

<sup>197</sup> See *supra* Part II.A.

<sup>198</sup> See OR. REV. STAT. ANN. § 197.352(8) (West 2005) (“[I]n lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.”).

<sup>199</sup> See *supra* note 119 and accompanying text.

and the value of land in an article addressing Oregon's Measure 37 written shortly after its passage.<sup>200</sup> Zoning and regulation affect the value of land in many ways, and not always negatively, although the negative impact often is the easiest to perceive.<sup>201</sup> The positive benefit of zoning on land values is "not well understood by the general public, in large part because of the indirect, invisible, and often gradual market forces at work."<sup>202</sup> While a restriction on a land or a burden, such as a property tax, may decrease the value of the land, the reinvestment of the tax into community amenities or specific benefits like roads and schools may ultimately raise the value of the land beyond the minimal burden.<sup>203</sup> To provide a salient example, in the case of *Lucas v. South Carolina Coastal Commission*, the developer won a \$1.5 million verdict because the government, through the Coastal Commission, had taken all economic value from the property.<sup>204</sup> However, the reward was so high only because the government had made the land valuable in the first place.<sup>205</sup> Had it not been for amenities allowing access to the property (in the form of roads and bridges) and other benefits, such as subsidized flood insurance, the land itself would have been essentially worthless, with or without the development restrictions.<sup>206</sup>

While the general assumption is that land use regulations negatively impact property values, they may in fact improve the property's value and that of the surrounding property as well.<sup>207</sup> The courts have long recognized reciprocity of advantage in allowing restrictions on land that burden individuals.<sup>208</sup> Waivers allow the exempted landowner to enjoy the amenity benefits that surrounding property owners pay for by shouldering the burden of the regulation, and transferable waivers disrupt that benefit with their longevity and durability.

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<sup>200</sup> See generally William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105 (2006).

<sup>201</sup> *Id.* at 126-27.

<sup>202</sup> *Id.*

<sup>203</sup> See *id.*

<sup>204</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992); Inden, *supra* note 56, at 146-47.

<sup>205</sup> See Inden, *supra* note 56, at 146-47.

<sup>206</sup> *Id.*

<sup>207</sup> Jaeger, *supra* note 200, at 106.

<sup>208</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) ("Reciprocity of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood.").

### 3. Transferable Waivers That Provide an Exception to a Regulation Increase the Value of the Property Due to Scarcity Created by Regulation

Another important force on the value of land that is overlooked by much of the compensation legislation debate is the scarcity effect caused by exempting select parcels through waivers.<sup>209</sup> Regulations limit the amount of land available for a certain purpose, making the land where that purpose is allowed more valuable than if the purpose were not restricted.<sup>210</sup> While such regulations are frequent and inescapable in most cities today, it is understandable that a landowner, concerned only with the value of his land, would find the restriction nothing but burdensome.<sup>211</sup> But waiving that restriction would cause the value of surrounding property to fall, while increasing the value of the land with the waiver beyond what it was prior to the restriction.

Scarcity effects influence housing prices, in that limiting land for development will increase the value of developable land or existing housing.<sup>212</sup> For example, if a regulation is enacted that limits the use of land south of the city to farmland only, areas zoned for housing nearby will increase in price. If one landowner were granted the right to develop his farmland into housing, that parcel would still enjoy the benefits of the regulation, along with the additional scarcity benefit of being the only developed land. Not only is the regulation beneficial to the community, but it may even be financially beneficial to the property owner, over time, over the cost of the burden.

### 4. Transferable Waivers Would Result in an Ineffective Zoning Plan and Lower the Value of Existing Homes

One specific instance of a cost to the community that waivers would have is decreasing the value of existing homes. A common interest of landowners in obtaining their waiver is to subdivide their land and build housing.<sup>213</sup> Two competing concerns play into this debate; first, that current homeowners will retain the value of their homes, and second, that the

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<sup>209</sup> Jaeger, *supra* note 200, at 106-07.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 126.

<sup>212</sup> *Id.* at 106.

<sup>213</sup> In Oregon, the largest percentage of known planned uses is residential property. Sheila A. Martin, *Measure 37 in Oregon: A Status Report*, 14 (2006), [http://www.pdx.edu/media/i/m/ims\\_M37pptNov06.pdf](http://www.pdx.edu/media/i/m/ims_M37pptNov06.pdf). A majority of the acreage covered by the claims is currently zoned for farm or forest use. Sheila A. Martin et. al, *What is Driving Measure 37 Claims in Oregon?*, 30 (2007), [http://www.pdx.edu/media/i/m/ims\\_M37April07UAAppt.pdf](http://www.pdx.edu/media/i/m/ims_M37April07UAAppt.pdf).

community as a whole will have affordable housing for its growing population. Zoning that makes development expensive also contributes to the value of the existing structure on the land. This is reflected in the fact that the cost of housing has risen dramatically higher than the actual construction cost of homes in the past thirty years, and research shows a correlation between zoning and inflated housing prices.<sup>214</sup> In a recent study, economists Edward Glaeser, Joseph Gyourko and Raven Saks find such a correlation,<sup>215</sup> suggesting that the significant price difference was due to the high cost of obtaining authorization to develop, caused by restrictive zoning laws.<sup>216</sup> Waivers would contribute to the weakening of zoning laws, which may in turn cause housing prices to fall. While affordable housing is a benefit to the community, in this case it would come at a cost to existing homeowners. With transferable waivers the potential impact survives the conveyance of the property.

Rather than examining demand in their study, Glaeser, Gyourko and Saks focus on supply, isolating three factors that contribute to determining the value of the home: land, the physical structure, and “government approval to put the structure on the land.”<sup>217</sup> They find that there has been a “dramatic rise” over the past thirty years “in the gap between price and construction cost” in markets with the highest housing prices.<sup>218</sup> According to their model, the rising cost of housing must either be due to an increase in the cost of construction, the price of land, or regulatory costs.<sup>219</sup> Although it would seem like a boon to developers for housing prices to be high above the cost of construction, it is not leading to the surge of new development

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<sup>214</sup> Edward L. Glaeser, Joseph Gyourko, & Raven E. Saks, *Why Have Housing Prices Gone Up?* 19-20 (Harvard Inst. of Econ. Research, 2005), available at <http://post.economics.harvard.edu/hier/2005papers/HIER2061.pdf>.

<sup>215</sup> An earlier study by Glaeser and Gyourko concluded that while “America as a whole may have a poverty crisis . . . its housing prices are basically being tied down by the cost of new construction.” Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 6 (Harvard Inst. of Econ. Research, 2002), available at <http://post.economics.harvard.edu/hier/2002papers/2002list>. This makes the cost of homes lower than it would be without burdens on the cost of new construction. *See id.* Their research found that most homes are priced close to the cost of construction, and endeavored to find why the cost is higher in some areas. *Id.* at 3, 5. They consider the “classic economics approach” that land is expensive and limited in supply, so where demand increases the cost of housing must rise, but instead favor an alternative hypothesis: high cost areas of housing exist “primarily because of government regulation, i.e. zoning.” *Id.* at 5. They conclude that while “America does not uniformly face a housing affordability crisis,” in areas where housing is over expensive, “zoning restrictions appear to have created these high prices.” *Id.* at 6.

<sup>216</sup> Glaeser et al., *supra* note 214, at 19-20.

<sup>217</sup> *Id.* at 2.

<sup>218</sup> *Id.* at 5. “Even in booming markets construction cost increases have been modest.” *Id.* at 3. In twenty-seven metropolitan areas, the cost of construction accounts for no more than 60% of the value of the home, and in the most extreme cases the physical structure is no more than 30% of the house value. *Id.* at 5.

<sup>219</sup> *Id.* at 2.

that might be expected.<sup>220</sup> Nor does the availability of land have a strong correlation to rising housing costs; some areas are even “low-density, high cost” and yet have limited new construction.<sup>221</sup>

Consequently, the authors turn to the cost of obtaining the right to develop land as the remaining reason for the dramatically high cost of housing. When “bundled together with the right to build,” land is significantly more valuable than land that is not developable.<sup>222</sup> That right to build is granted or withheld by regulations, in most cases zoning regulations.<sup>223</sup> The authors question why zoning has become more potent in the last thirty years, and conclude that existing homeowners influence local governments to restrict development through zoning, because they are motivated by the desire to keep a low-density quality of life and preserve their home’s value.<sup>224</sup> Regulations are purportedly intended to limit sprawl, resulting in “restrictions on new supply” that limit new housing construction and raise costs.<sup>225</sup> If the regulations are overextended and burdensome, relieving those regulations through limitations such as partial regulatory takings measures may in fact be beneficial to the community in that it will prevent skyrocketing housing costs and allow for more affordable housing.

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<sup>220</sup> Glaeser et al., *supra* note 214, at 6 (“It is no longer the case that high prices relative to construction costs generally lead to a surge in new construction.”).

<sup>221</sup> *Id.* at 8.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 9.

<sup>224</sup> The “rise of homeownership and success of community of organization” in influencing political decisions, the decreasing ability of developers to use cash to influence decision makers, and a preference for living in a low-density community, contribute to this result. *Id.* at 13-14. The hypotheses explored were the preferences of judges and other political decision-makers, the impact of homeowners groups and their organizational sophistication, the ability of developers to use cash to “influence local decision-makers,” the increase of high-valued amenity rich neighborhoods, and a change in the way new construction affects the value of existing houses. *Id.* at 18.

<sup>225</sup> This theory was applied specifically to the situation in Oregon shortly after the passage of its compensation measure by Paul Boudreaux, who cited the Oregon experience as an exception to the economic study’s predictions. Paul Boudreaux, *The Three Levels of Ownership: Rethinking Our Restrictive Homebuilding Laws*, 37 URB. LAW. 385 (2005). Boudreaux highlights the experiences of Loudon County, Virginia and Portland, Oregon, to demonstrate that the politics of land use are “often messy and unpredictable and do not always fit economic models.” *Id.* at 402. Boudreaux’s article claims that Oregon diverged from the path predicted by the economists in passing Measure 37, noting that a “referendum to start up the bulldozers and carpenters” conflicts with the economists’ model of homeowners defending against new construction. *Id.* at 401. He also believes that the cost of housing is not dramatically higher, although Portland has “long been famous for its tight restrictions on land use development,” which would lead to higher home prices under the economic model. *Id.* at 400. However, in making his conclusion that the costs are not dramatically high, he looks at only the final cost, not the increase over the cost of housing. *Id.* Boudreaux still finds merit in the economic study as it helps understand “why laws to restrict new housing are so popular, and how they serve to benefit current homeowners and raise home prices,” reinforcing the point that the ability to develop your land may decrease the value of your neighbors house. *Id.* at 402.

Ironically, the loss to the value of existing housing is similar to the original issue of government regulation decreasing the value of an individual's property for the good of the community without compensation. Writing before the passage of most regulatory takings measures, Glaeser and Gyourko suggested that regulation on development be decreased in order to bring the cost of housing closer to the cost of construction and thus more affordable.<sup>226</sup> Regulatory takings measures in effect do just that by eliminating regulation on development, though on a case by case basis rather than across the board. The economists speculate that in order "to make this politically feasible, it is crucial that any political reform also try to compensate the losers for this change."<sup>227</sup> Thus it would be politically necessary to compensate the neighbors of someone who obtains a waiver for the loss of the value to the neighbors' homes. It is indicative of the complexity of this situation that the people the economists frame as the "losers" remain uncompensated by partial regulatory takings statutes, while the debate focuses on restoring the rights of the people causing this harm.<sup>228</sup> With transferable waivers, the loss would occur upon the development of the land, which could be several transfers of the parcel after the regulation was enacted, making the negative impact on the neighbors and overcompensation of landowners more difficult to track but still very real.

##### 5. Transferable Waivers Have an Overall Greater Impact than Personal Waivers

Both transferable and personal waivers will affect the scarcity and amenity values of other land. However, transferable waivers are more flexible and durable, and will aggravate the existing negative effects on the community's property values while increasing the value given to the parcel's owner.

Part of the problem of understanding the full impact of waivers is that two different economic impact concepts are often used interchangeably<sup>229</sup>: the effect of a regulation on property values over many parcels, and the effect of an exemption to existing land use regulations.<sup>230</sup> Because of the amenity effects and scarcity effects created by land use regulations, prop-

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<sup>226</sup> Glaeser & Gyourko, *supra* note 215, at 21-22.

<sup>227</sup> *Id.* at 22.

<sup>228</sup> It seems that the property rights movement, appealing to the sentiment of voters in order to get compensation statutes passed through ballot initiatives, is able to tap into the fairness of diminishing property value directly through zoning, but not the indirect diminishment of property value of zoning neighboring property.

<sup>229</sup> In the Oregon debate, "the value of an individual exemption has commonly been interpreted as being identical to, or a proxy for [the effect of a land-use regulation on property values]." Jaeger, *supra* note 201, at 108.

<sup>230</sup> *Id.* at 105.

erty values may actually rise due to regulation. Removing the regulation from one particular parcel would make that parcel's value rise dramatically, even if the regulation had raised property values overall.<sup>231</sup> The resulting value that a property owner would get from a waiver is not just the inherent value of the land. Rather, the property owner gains the new value of the land, as benefited by the amenity effects created by the zoning, plus the additional scarcity value of being the only land exempted by the waiver.

A transferable waiver would allow a landowner a unique gain only feasible "so long as the benefits associated with the land-use regulation are unaffected."<sup>232</sup> Were the zoning to be removed, the benefits of the scarcity and amenity effects would dissolve, as would the additional value if the land were the only one to receive the exception.<sup>233</sup> Presumably there would be a similar effect if all zoning was waivable to all landowners, and if enough parcels were developed that the regulation became ineffective. If transferable waivers were available and all landowners took advantage of them, the problem of overcompensation would disappear, as there would be no scarcity or amenity effects driving up the value of any single parcel. Then again, the zoning would have disappeared as well, along with the benefits intended by the government to be created by the zoning.

A final issue with transferable waivers is the skewed incentives they offer. Transferable waivers may encourage landowners who were otherwise disinterested in development to obtain a waiver as a smart investment. Because transferable waivers may only be requested soon after the regulation (or passage of the statute, if applied retroactively) but may be held indefinitely, landowners may be encouraged to obtain a waiver "just in case," even if they would not have been interested in developing their land otherwise.<sup>234</sup>

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<sup>231</sup> *Id.* at 106.

<sup>232</sup> *Id.* at 126.

<sup>233</sup> *Id.* ("It is highly problematic to disentangle the separate effects of a particular land-use regulation from the effects of other actions and responses that may be independent or related to any given land-use regulation.").

<sup>234</sup> However, depending on how the value of the land is assessed, there may be a tax disincentive to obtaining a waiver if the homeowner does not plan to develop or sell the land soon. Theoretically, the value of the land increases as soon as a waiver is obtained, and depending on how the state interprets the value of the waiver and reassesses property for tax purposes, the land could be taxed at a higher rate while the landowner holds the waiver even if it is undeveloped. This poses another problem in states with measures that apply retroactively. For example, in Oregon, a Measure 37 claimant was charged \$6,000 in back taxes for the past ten years on farmland property that was approved for a subdivision. Damian Mann, *The Measure 37 Catch: Back Taxes*, MAIL TRIB., Mar. 23, 2006, <http://www.mailtribune.com/archive/2006/0323/local/stories/04local.htm>. However, given that the move would be viewed as penalizing Measure 37 claimants, it is unlikely that local governments in most states will pursue it. *Id.*

B. *Personal Waivers Offer Compensation in Certain Cases Without the Aggravated Impact of Transferable Waivers*

Despite the apparent unpopularity of personal waivers with proponents of regulatory takings measures generally,<sup>235</sup> they may be the compromise necessary to balance the need to compensate property owners and the community's need for the ability to enact zoning and gain from its economic benefits. Development and even alienability of the land are feasible under personal waivers, though admittedly not as easily as with transferable waivers. It allows specific performance when someone plans to use or is using land for a certain purpose, and it does not expire so long as there is continuity of ownership. The process established ensures an efficient way to make a claim. Additionally, personal waivers achieve a balance by allowing some zoning to take effect eventually. The government retains the potential ability to regulate property beyond what would be possible with transferable waivers. Personal waivers thus minimize the negative impact of waivers on the community's benefits from regulation.

1. Development by Subsequent Owners is Feasible Under Personal Waivers

At first glance, it would appear that the landowner must develop the land personally. However, if a landowner (like George Forsman, whose story was discussed in the introduction) does not have the desire or finances to develop the property personally, outside resources and collaboration may be required to achieve the goal. Conveying the land with a waiver outright would not be possible, but more creative solutions make development feasible.

Oregon's Measure 37 has been interpreted as providing only personal waivers, but still allowing the property owner to share or convert some interest before conveying the property and closing the window for development permanently.<sup>236</sup> The landowner could retain a "reversionary or possessory interest in the subject property" in order to allow the nonpermitted use to commence.<sup>237</sup> This requirement could be met in a variety of ways, ranging from corporate ventures between landowners and developers, to sub-leasing the property to a real estate contract. Once the development has vested, full ownership may be transferred to the developer who would by

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<sup>235</sup> None of the proposed measures have provided for personal waivers, and property rights advocates are fighting against the interpretation of personal waivers being applied to Measure 37 in Oregon. *See supra* Part III.

<sup>236</sup> *See id.* ("An exception exists if [the owner] retains a reversionary or possessory interest in the subject property. In that context the date of acquisition does not change.")

<sup>237</sup> *Id.*

then have a right to the nonconforming use. Because the landowner incurs the added cost of finding a developer willing to enter into an unconventional arrangement, such a restriction may mean that only the most feasible land is selected for development. In contrast, land where development is unsupported by market demand for the duration of the current landowner's term will come under the regulation when the property is finally conveyed.

## 2. Problems With Personal Waivers and the Incomplete Relief They Provide Are Outweighed by the Benefit to the Community

Personal waivers do not give the same benefit to landowners as transferable waivers, and they arguably do not make landowners "whole" in the way that transferable waivers might. Without the ability to convey a waiver, even after the property owner has vested the use with development,<sup>238</sup> the property owner will at best be conveying a nonconforming use to the new owner.<sup>239</sup> The subsequent property owner therefore is limited by the rules of nonconforming uses, and may not use the land for any purpose that was previously allowed by the vested use—unlike the subsequent owner of a transferable waiver. These limitations may diminish the property's resale value, potentially making the landowner's net gain less than what it would have been prior to the zoning<sup>240</sup> (though that loss may be offset by the increase in value caused by the scarcity and amenity effects of removing the regulation from a specific parcel).<sup>241</sup>

Still, while personal waivers do not put the landowner in the exact same situation as before, neither do transferable waivers, which give the landowner additional benefits over what they had before the regulation. Nor does the traditional common law remedy of compensation, which does not provide for specific performance. Personal waivers allow development, but also allow for future zoning, and give neighbors the assurance of finality once the property is conveyed and the regulation takes effect.

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<sup>238</sup> *Id.*

<sup>239</sup> *Crook County Decision*, *supra* note 12, at 11; Steven W. Abel, Stoel Rives Dev. Law Group Annual Event, Presentation on Oregon Ballot Measure 37 (Mar. 2, 2006), <http://www.stoel.com/show-article.aspx?Show=1826> ("Neither of these concepts provides complete safety. The parameters for qualifying as a nonconforming use are narrow. And further, there are problems with lenders, title companies, and insurers whenever you're in a circumstance that relies on nonconforming use rights.")

<sup>240</sup> Additionally, if the tax value of the land is reassessed upon obtaining a waiver, rather than upon vesting the new use, the owner may pay taxes on the higher value of the land but end up conveying it at its lower price. A landowner might successfully obtain a waiver, increasing the value of his land, but be unable to develop the property. The landowner would pay taxes on the increased value of his land for the years after the waiver but before conveyance. Because the waiver cannot be conveyed, the landowner must sell the property at its lower value, burdened by the regulation. *See supra* note 235.

<sup>241</sup> *See supra* Part IV.A.2-3.

Unlike transferable waivers, which create a super-parcel that cannot be regulated, personal waivers require that the development of the land be tied to the landowner at the time the waiver was passed. This ensures that if and when development occurs under the waiver, it must be within at least one degree of separation from the landowner who was harmed by the regulation.<sup>242</sup> This limitation will benefit the government's regulatory scheme, which will be enacted on any undeveloped property once that land is conveyed. Neighbors will also benefit from the finality of either development or transfer of land, which may influence their decisions regarding their own property. Thus personal waivers strike a balance between the "under-compensation" of the traditional common law remedy and the "over-compensation" of transferable waivers, yielding an equitable solution to a difficult problem.

#### CONCLUSION

Partial regulatory takings compensation statutes are becoming more popular if not prevalent, well before the long-term impact of the early measures can be seen. While proponents of such measures focus on making landowners whole again, and opponents focus on maintaining unfettered regulatory planning, other factors such as property values and housing prices should be taken into account as well when considering this issue.

Development under the two available types of waivers, personal and transferable, proceeds differently given the difference in the restrictions they impose. However, most goals of property rights proponents can be achieved through the use of personal waivers rather than transferable waivers, which create a super-parcel immune from present and future regulation. While each state must consider the statutory provisions that support its land use plan, personal waivers sufficiently protect the interests of landowners while preserving the state's ability to regulate adequately, and should be considered as a superior alternative to transferable waivers.

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<sup>242</sup> It is possible this could encourage premature or speculative development. However, because development, unlike obtaining a waiver, is a costly venture, people are unlikely to develop unless they are likely to benefit from the utility or marketability of the development. *See supra* Part IV.A.4.