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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MARION

Hector MacPherson; Bannockburn Farms, )  
Inc.; Clackamas County Farm Bureau; )  
Linn County Farm Bureau; Washington )  
County Farm Bureau; Marion County Farm )  
Bureau; Yamhill County Farm Bureau; )  
David T. Adams; Mark Tipperman; James )  
D. Gilbert; Northwoods Nursery, Inc.; )  
David A. Vanasche; Keith Fishback; )  
Fishback Nursery, Inc.; Jack Chapin and )  
1000 Friends of Oregon, )

Plaintiffs,

v.

Department of Administrative Services, )  
Risk Management Division, by and through )  
Laurie Warner, its Acting Director; Land )  
Conservation and Development )  
Commission, Department of Land )  
Conservation and Development, by and )  
through Lane Shetterly, its Director; The )  
State of Oregon Department of Justice, )  
by and through its Attorney General, Hardy )  
Myers; Clackamas County; Marion County )  
and Washington County, )

Defendants. )

Case No. 05C10444

OPINION AND ORDER  
ON MOTIONS FOR  
SUMMARY JUDGMENT

**PROCEDURAL BACKGROUND**

This case came before this Court on September 13, 2005 upon the Motion for Summary Judgment Against Plaintiffs by Intervenor-Defendant Howard Meredith; the Motion for Summary Judgment of Defendants Department of Administrative Services, Land Conservation and Development Commission and State of Oregon Department of Justice (State Defendants); Plaintiffs' Cross-Motion for Summary Judgment; and the Motion for Summary Judgment of Intervenor-Defendants Dorothy English, Barbara Prete and Eugene Prete. Intervenor-

1 Defendant Meredith moved to dismiss Plaintiffs' complaint on the ground that Plaintiffs failed to  
2 state a justiciable controversy. Plaintiffs moved to amend the pleadings to conform with the  
3 evidence submitted in support of Plaintiffs' summary judgment motion. Plaintiffs appeared  
4 through counsel Todd Baran; State Defendants appeared through counsel Stephen Bushong;  
5 Intervenor Howard Meredith appeared through counsel Russell Baldwin; Intervenors Dorothy  
6 English, Barbara Prete and Eugene Prete appeared through counsel Ross Day; Intervenor  
7 Jackson County appeared through counsel Michael Jewett; Attorney Jane Stonecipher  
8 appeared on behalf of Defendant Marion County, but did not participate in the hearing; Leslie  
9 Lewallen appeared telephonically on behalf of amicus Pacific Legal Foundation, but did not  
10 participate in the hearing.

11 The court reviewed the pleadings, memoranda, affidavits and other documents  
12 submitted, heard the lawyers' oral argument, and reviewed supplemental briefing as ordered.  
13 The court took the matter under advisement. Now, being fully advised in the premises, the  
14 court rules as follows:

#### 15 **Motion to Amend Pleadings to Conform to Evidence**

16 Direct evidence of Measure 37 claims filed and resolved by modifying, removing or not  
17 applying land use regulations in favor of property owners does not appear in plaintiffs' first  
18 amended complaint, because claims filed had not been resolved at the time of plaintiffs' filing.  
19 In support of their Motion for Summary Judgment, Plaintiffs supplied evidence of numerous  
20 claims filed and waivers of existing land use regulations that directly and adversely affect one or  
21 more Plaintiffs. During the hearing, Plaintiffs sought leave to amend the pleadings to conform  
22 to the evidence. The court grants the amendment. *See Hussy v. Huntsinger*, 72 Or App 565,  
23 569, 696 P2d 580 (1985) (amending complaint, based on summary judgment record, to include  
24 plaintiff's evidence that she had given requisite tort claim notice); ORCP 23 B. Furthermore,  
25 the amendments relate back to the date of the original pleading, *see* ORCP 23 C, so that if  
26 plaintiffs' complaint is currently justiciable, it will be considered to have been justiciable from the  
27 date it was filed.

#### 28 **Motion to Dismiss Claims based on lack of a Justiciable Controversy**

Intervenors Meredith and English claim that this court has no subject matter jurisdiction  
because plaintiffs fail to present a justiciable controversy under ORS 28.020. They assert there  
is no actual controversy because plaintiffs' alleged harm will occur, if at all, on a future date.  
They allege that a decision by this court would be advisory because it will have no practical  
effect on plaintiffs' rights, as plaintiffs cannot demonstrate an injury to or an impact on their  
legally recognized interests. Intervenor Meredith moved for dismissal on this basis.

ORS 28.010 provides this court with authority to issue a declaratory judgment. Even  
with that authority, however, the case must present a "justiciable controversy" such that  
plaintiffs have constitutional standing and the case does not result in the court issuing an  
advisory opinion. The test of whether a controversy is justiciable is two-part: that the parties be  
adverse and that a decision would have a practical effect. *See Utsey v. Coos County*, 176 Or  
App 524, 548, 32 P3d 933 (2001), *review dismissed*, 335 Or 217 (2003). It requires a

1 determination whether “there is an actual and substantial controversy between parties having  
2 adverse legal interests. The controversy must involve present facts as opposed to a dispute  
3 which is based on future events of a hypothetical issue. *Erwin v. Oregon State Bar*, 149 Or App  
99, 106, 941 P2d 1094 (1997).

4 The adversity of the parties' legal interests is clear from the fact that plaintiffs assert that  
5 Measure 37 is unconstitutional, while defendants and intervenor-defendants defend its validity.  
6 See *Scherzinger v. Portland Custodians Civil Serv. Bd.*, 196 Or App 384, 103 P3d 1122 (2004)  
(the adversity requirement ensures that parties do not advocate the same position).

7 The question of whether the adjudication will have a “practical effect” on the plaintiff  
8 asks whether the plaintiff has more than an abstract interest in the litigation. See *Utsey*, 176 Or  
9 App at 539-44 (“Without some demonstration that the challenged agency action will have a  
practical impact on the person challenging it, [a case asserting that the action violated the law]  
amounts to no more than a request for an unconstitutional advisory opinion”).

10 The following factual summary demonstrates that the adjudication will have a practical  
11 effect on plaintiffs.<sup>1</sup>

12 David T. Adams, an individual plaintiff, owns property near property owned by a  
13 Measure 37 claimant, Charles Hoff. Hoff has received relief in the form of the non-application of  
14 Statewide Planning Goal 3 to his property and thus, permission to subdivide his property. Hoff  
15 has taken steps to subdivide his land, by clear-cutting and bulldozing the land, which sits at the  
16 top of the Wilson Creek Watershed in Clackamas County. The activity destroyed a wildlife  
17 corridor and adversely affects the watershed. Adams’ property will also be affected by a  
18 second claim, filed by an owner within one-half mile of Adams’ property. Both of these  
19 properties are outside of the Urban Growth Boundary. The amount and quality of water  
20 available to Adams will decrease with the addition of wells and septic systems on the Hoff  
21 property and, if permitted, on the other claimant’s property, since the City of West Linn will not  
22 provide services to any new subdivisions outside the Urban Growth Boundary and the water  
23 table is already overtaxed. Adams purchased his property in reliance on the fact that, because  
24 of zoning restrictions, no additional wells would be drilled. The roads, which are at over-  
capacity, will see increased traffic, causing disruption and delays, as well as increased noise,  
pollution, risk of accidents, and the potential that emergency services will be delayed. The  
educational system will be further strained, which will result in the shifting of tax monies from  
other programs to schools, or to increased taxes. If the second Measure 37 claimant receives  
compensation instead of non-application of the land use regulations, that money will be drawn  
from tax revenues paid by Adams that would otherwise be used to provide services that would  
benefit him (Adams March 7, 2005 Aff, and Depo, pp 19-21, 35-41).

25 Plaintiff Hector MacPherson, as individual plaintiff and as president of plaintiff  
26 Bannockburn Farms, Inc., owns property that is adjacent to and near properties with potential

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27 <sup>1</sup> The parties do not dispute any material facts. As such, this court must decided whether  
28 intervenors, defendants, or plaintiffs are entitled to summary judgment as a matter of law.

1 Measure 37 claims. If land use regulations are not enforced, the residential uses permitted will  
2 be incompatible with his farm operations, which will impair those operations, resulting in lost  
3 profits and a potential loss of his farm business. Alternatively, if the Measure 37 claimants are  
4 compensated, that compensation will come from tax revenues paid by MacPherson that would  
5 otherwise be used to provide services that would benefit him (MacPherson March 30, 2005 Aff).

6 Plaintiff Mark Tipperman is a member and the manager of McCoy Meadows Ranch,  
7 LLC, a 2,500-acre timber and cattle ranch that seasonally leases the land to others for livestock  
8 grazing and is suitable for fee hunting and fishing, but which does not qualify for a Measure 37  
9 claim. The ranch is "largely surrounded" by properties that qualify for claims under Measure 37  
10 based on the dates they were acquired, and Tipperman purchased his property in reliance on  
11 zoning restrictions then in effect. If residential subdivisions and non-farm dwellings are allowed  
12 on those properties, they will be incompatible with use of the ranch for commercial livestock  
13 grazing and will diminish the value of the land and the leases. Dogs from adjoining subdivisions  
14 and non-farm dwellings will harass the livestock and wildlife, and there will be trespassing and  
15 poaching, a reduction in stream flow which supplies water for livestock and fish, increased  
16 fence repair, and increased expenses for patrolling and water development for livestock and  
17 fish. If local governments choose to compensate Measure 37 claimants rather than not enforce  
18 land use regulations against them, those funds will be drawn from tax revenues paid by  
19 Tipperman and which would otherwise be used to provide services that would benefit him and  
20 the ranch (Tipperman March 29, 2005 Aff, and Depo pp 18-20, 26-33).

21 James D. Gilbert, an individual plaintiff, Clackamas County property owner, and  
22 president of plaintiff Northwoods Nursery, Inc., testified that there are exclusive farm use (EFU)  
23 properties in his county owned by persons with potential Measure 37 claims, but that his  
24 properties, which are also zoned EFU, are not eligible to make a claim. As Clackamas County  
25 continues to waive land use restrictions against Measure 37 claimants, residential uses of the  
26 properties will conflict with his nursery operations, which will impair his business and result in  
27 lost profits, the potential loss of his business, the diminished value of his land, and a decrease  
28 in property available to expand his business. If the claimants receive compensation, that will be  
drawn from tax revenues he paid and that would otherwise be used to provide services to him  
(Gilbert March 6, 2005 Aff).

David A. Vanasche, an individual plaintiff, owns numerous EFU-zoned properties in  
Washington County. Several properties very close to the properties he farms, including  
properties that border and are within one-eighth of a mile of his properties, are owned by  
persons who have submitted claims pursuant to Measure 37. Vanasche relied on the zoning  
restrictions when he purchased his property and entered into lease agreements for the  
additional properties he farms. In the past, his residential neighbors have objected to the noise,  
dust, and use of chemicals on his farm. If the land use regulations on Measure 37 claimants'  
properties are not enforced, there will be an increase in conflicts with residential uses, including  
complaints about dust, noise, and pesticide spraying, traffic congestion, vandalism, and  
depletion of the water table. All of these conflicts will impair his ability to conduct some or all of  
his farm operations because, to lessen the number of complaints, he will restrict his operations.  
Restricting his operations impairs his profitability, which leads to a potential loss of his farm  
business. In addition, the non-application of land use regulations to Measure 37 claimants'

1 property leads to less property being available for his expanding farm business. The portion of  
2 Vanasche's lands that do not qualify for a Measure 37 claim will become less valuable because  
3 the costs and burdens of farming them will increase, in part due to the loss of the infrastructure  
4 needed to support farm businesses, such as supply stores, grain and crop processing plants,  
5 and implement and fertilizer dealers. These farming infrastructure businesses are already on  
6 the verge of collapse because there are fewer farmers in the area, and the loss of farmers on  
7 Measure 37 claimants' properties will likely hasten that process. Vanasche will then be required  
8 to travel further for the services, which will increase his expenses and decrease his profitability.  
9 Alternatively, if Measure 37 claimants receive compensation, that money will come from tax  
10 revenues paid by Vanasche and that would otherwise be used to provide services to him  
11 (Vanasche March 23, 2005 Aff, Depo pp 30-31, 39-63).

8 Keith Fishback is an individual plaintiff and president of plaintiff Fishback Nursery, Inc.,  
9 which operates a nursery business in Washington County on land that is partially owned by  
10 Fishback, or by an LLC in which he is a member. When purchasing the property, Fishback  
11 relied on zoning to protect it from incompatible uses. A Measure 37 claim has been filed on a  
12 property within one-quarter mile from one of the properties on which the nursery runs its  
13 business, and additional properties are eligible to make claims. If land use regulations on that  
14 property is not enforced, Fishback's nursery operations, which include spraying, equipment  
15 noise, and dust will conflict with the residential uses, and increased traffic will impede the  
16 nursery's movement of equipment and products. In the same way that the conflicts Vanasche  
17 described will impact Vanasche's agricultural operations, they will impact Fishback's, leading to  
18 an impaired ability to conduct some or all of the nursery operations, which will result in lost  
19 profits, a potential loss of the business, and diminished value of the land because the Fishback  
20 properties are not eligible to make Measure 37 claims, as well as less property available to  
21 expand the nursery operation. If, however, Measure 37 claimants receive compensation, that  
22 will be paid from tax revenues paid by Fishback and that would otherwise be used to provide  
23 services to him (Fishback March 25, 2005 Aff, Depo pp 10-19, 21).

18 Jack Chapin is an individual plaintiff who, with his wife, has owned 440 acres of EFU-  
19 zoned land for over 30 years, and another 60 acres for three years. He operates a farming  
20 business on his Marion County properties. Properties around his are owned by persons with  
21 potential Measure 37 claims. If land use regulations are not enforced on those properties,  
22 residential uses on those properties will be incompatible with his farming operations, which  
23 includes spraying, noise, and dust. Increased traffic on roads will impede and possibly prevent  
24 him from moving farm equipment between his properties. This will impair Chapin's ability to  
25 conduct some or all of his farming operations and will result in a loss of profits and potential  
26 loss of the farming business. It could also result in the diminished value of the portion of his  
27 property not eligible for a Measure 37 claim because farming it will become more burdensome.  
28 In addition, there will be less land available to expand his farm operations. If the Measure 37  
claimants are instead compensated, that money will be drawn from tax revenues paid by  
Chapin and that would otherwise be used to provide services to him and his family (Chapin  
March 25, 2005 Aff).

Presidents of the five County Farm Bureau plaintiffs stated that their operating budgets  
are funded by membership dues, and that their abilities to fulfill their missions of supporting "the

1 continuation of agriculture enterprises, and prosperity for Oregon farmers and ranchers” and  
2 serving their members depends upon maintaining a minimum membership base, which in turn  
3 depends on their success in fulfilling their missions and providing member services. Measure  
4 37 claims have been made in each of their respective counties, and the counties will modify,  
5 remove, or not apply the relevant land use regulations, as they have no funds to compensate  
6 land owners in lieu of enforcing the law. As the land use regulations are not applied to Measure  
7 37 claimants’ lands, those properties will be subdivided for residential and other non-farm uses,  
8 which will cause the membership bases for the farm bureaus to contract. Furthermore, the  
9 conflicts between non-farm uses and farm uses – residential users complain about agricultural  
10 operations’ noise, chemical sprays, smells, and pollution, and the agricultural operations suffer  
11 from increased traffic, inability to move farm equipment, trespass, vandalism, and a decreased  
12 supply of land for expansion – will cause agricultural operations to fail at a higher rate. This, in  
13 turn, will impair the bureaus’ membership because only persons who derive a substantial  
14 portion of their income from farm operations may become voting members of the county farm  
15 bureaus. Finally, Measure 37 prevents the bureaus from fulfilling their function of maintaining  
16 and preserving land use planning to protect the resources and agricultural infrastructure  
17 needed for agricultural operations, thus resulting in a loss of members, dues, and contributions,  
18 and threatening the viability of the farm bureaus (Larry Wells March 14, 2005 Aff, Depo pp 23,  
19 32, 34, 36-38; Pete Postlewait March 25, 2005 Aff; Dan Thackaberry March 18, 2005 Aff; Loren  
20 Vanderzanden March 14, 2005 Aff; Dave Cruickshank, March 13, 2005 Aff).

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Bob Stacey, Executive Director of 1000 Friends of Oregon, a nonprofit charitable organization, testified that the organization works to conserve Oregon’s farm, forest and range lands, promote compact, livable cities, protect natural resources and scenic areas, and defend opportunities for citizens to participate in planning decisions. The organization is funded by grants, membership dues and charitable contributions. Measure 37 “all but eliminates” the organization’s role in shaping future land use regulation and prevents it from prospectively performing its missions. In the long term, this will result in decreased membership, which means less funding, threatening the organization’s existence (Stacey March 28, 2005 Aff, Depo. pp. 24-27). James McDonald, President of the Board of Directors of 1000 Friends of Oregon, explained that Measure 37 effectively eliminated 1000 Friends’ role in advocating for future land use planning and its advocacy function. He said that 1000 Friends would not enjoy a long-term benefit from the spike in membership that occurred while Measure 37 was being presented to the voters. After the election, some people have been reluctant to contribute to 1000 Friends as new members because they did not believe it could be effective in the future, and he is concerned about the possibility that people will not want to contribute because they fear 1000 Friends will not continue to be in existence. (McDonald Depo. pp. 29-30, 33-34, 40-45).

There is evidence before this court that, rather than paying property owners who have made valid claims pursuant to Measure 37, at least one public entity, Defendant Department of Administrative Services (DAS) (on the recommendation of Defendant Department of Land Conservation and Development) which considered Hoff’s Measure 37 claim, chose not to apply the land use regulations applicable to Hoff’s property which were implemented after he purchased the property in 1977. Development on his property has already begun. There is also evidence that property owners near the properties owned by Adams, Vanasche, and

1 Fishback have currently pending Measure 37 claims.

2 Pending or resolved Measure 37 claims affect lands near the properties of individual  
3 plaintiffs Adams, Vanasche and Fishback, and corporate plaintiff Fishback Nursery, Inc.<sup>2</sup>  
4 Individual plaintiff Adams has already suffered a direct and adverse effect from the non-  
5 application of land use rules to the Hoff property, because wildlife on that property has been  
6 displaced and the watershed has been interfered with, leading to a decrease in the serenity and  
7 desirability of the area. In addition, as Hoff continues to develop his property, and in the event  
8 land use rules are not applied to the second property owner who filed a Measure 37 claim near  
9 Adams, the amount and quality of water available to Adams will decrease, and the educational  
10 system will be further strained, which will impact the value of Adams' tax payments and likely  
11 lead to tax increases. The roads surrounding his property will be further congested, and there  
12 will be increased noise, pollution, commute time and risk of accidents, as well as the potential  
13 that emergency service vehicles will be delayed.

14 As to individual plaintiffs Vanasche and Fishback, and corporate plaintiff Fishback  
15 Nursery, they are certain to be adversely affected because Measure 37 claims have been filed  
16 for properties near their properties and land use regulations will not be enforced on those  
17 properties. If land use rules are not applied to those properties, development on them will  
18 cause plaintiffs to be subject to complaints from residential neighbors based on their agricultural  
19 operations, will lessen the water table, and will lead to increased traffic on the roads, which will  
20 impact the ability of the operations to move equipment and products. To combat the  
21 complaints, the plaintiffs will restrict their operations, which will impair their profitability. In  
22 addition, the increased development will subject the agricultural operations to increased risk of  
23 trespass and vandalism, and will lead to less farm infrastructure being available to support  
24 plaintiffs' agricultural operations. All of these impacts will affect the profitability of the  
25 agricultural operations and thus the ability of plaintiffs to continue those operations. The  
26 increase in residential development will also result in decreased availability of land for plaintiffs  
27 to purchase to expand their operations.

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28 <sup>2</sup>Intervenor English asserts that Fishback, to the extent Fishback's properties are held by  
an LLC rather than Fishback personally, lacks standing because his properties are owned by an  
LLC, and as a member and/or manager, he has no interest in those properties. Although an LLC  
member does not own the property of the LLC, the member does have an ownership interest in the  
LLC. See *Benson Apartments LLC v. Douglas County Assessor*, Nos. TC-MD 040518C, TC-MD  
040519C, 2005 WL 1804412, at \*2 (Or TC July 27, 2005) (a member has an ownership interest  
in an LLC, although the member does not own the property of the LLC); ORS 63.239 (a person with  
a membership interest in an LLC "has no interest in *specific* limited liability company property"  
(emphasis added)). As a result, an LLC member is affected by circumstances that affect the LLC's  
profitability and viability. Here, Fishback has shown that Measure 37 affects the profitability, and  
perhaps the viability, of his company, because if anything impacts the profitability of his farming  
operations, it also impacts his income (Fishback Depo. pp. 13-14, 21). Consequently, he has  
standing in this litigation.

Intervenor English makes the same argument regarding Tipperman. Although the same  
analysis would apply to provide Tipperman with standing, his standing in this litigation is, as will be  
discussed below, based on the potential tax burden to him, not on his property ownership.

1 There is no evidence that property owners proximate to plaintiffs MacPherson,  
2 Tipperman, Gilbert, or Chapin, or corporate plaintiffs Bannockburn Farms, Inc. and McCoy  
3 Meadows Ranch, LLC, have actually filed Measure 37 claims. Thus, they have not  
4 demonstrated an imminent threat that land use regulations applicable to properties near theirs  
5 will not be enforced. The standing question for these plaintiffs does not stop here, however.

6 None of the ramifications of Measure 37 are hypothetical; they are necessarily felt once  
7 a property owner within the plaintiffs' counties files a claim pursuant to Measure 37. At that  
8 point, the public entity is required to either decide not to apply the applicable land use  
9 regulation(s) or to pay "just compensation" to the property owner. All of the individual plaintiffs  
10 have presented evidence that property owners within each plaintiffs' county have made  
11 Measure 37 claims.<sup>3</sup> Even if public entities are able and elect to compensate property owners  
12 within the respective counties of each of the plaintiffs pursuant to Measure 37, that  
13 compensation will necessarily be derived from tax revenues paid by plaintiffs. Should that  
14 happen, plaintiffs will suffer because less revenue is available to pay for other services such as  
15 law enforcement, emergency and health services, and transportation services. See *Savage v.*  
16 *Munn*, 317 Or 283, 291, 856 P2d 298 (1993) (taxpayers have standing to challenge provision  
17 when they allege "fiscal consequences that affect them").

18 Each of the counties must, therefore decide whether to use money plaintiffs paid in  
19 taxes to pay these claims, or not to apply the land use regulations. Either way, individual  
20 plaintiffs have shown that there is an actual and substantial controversy and that the outcome of  
21 this litigation will have a practical effect on them. Either plaintiffs will see fiscal consequences or  
22 a direct impact on their own property values, professional prospects, and environments.  
23 Consequently, there are current, concrete ramifications to the individual plaintiffs, since  
24 Measure 37 claims are pending for properties within their counties. Cf. *Doty v. Coos County*,  
25 185 Or App 233, 235 n 1, 59 P3d 50 (2002) (plaintiff had standing under *Utsey* when she  
26 alleged that she used river in vicinity of the subject property for passive enjoyment and that  
27 development of the property "would significantly change the character of the vicinity and would  
28 adversely affect my use and enjoyment of the Coquille River estuary in the vicinity of the . . .  
property"), *adh'd to on reconsid*, 186 Or App 580 (2003).

That the full ramifications of these Measure 37 claims may not yet be fully felt does not  
vitiating the practical effect on plaintiffs. The court need not wait until actual injury is incurred to  
determine whether an action is appropriate. Rather, it may look at the potential harm a plaintiff  
alleges it may suffer and determine that the potential harm provides sufficient evidence of  
concrete, actual harm to provide the plaintiff with standing. See *WaterWatch v. Water*

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<sup>3</sup> Chapin's property is located in Marion County. The affidavit of Larry Wells, Marion County  
Farm Bureau President, states that claims have been filed in Marion County. Moreover, this court  
takes judicial notice of the fact that, as of October 14, 2005, there were eighty-five claims listed on  
the claims registry ([www.oregon.gov/DAS/Risk/M37Registry-.shtml](http://www.oregon.gov/DAS/Risk/M37Registry-.shtml)) currently pending or resolved  
in Marion County.

The Tipperman affidavit also does not specifically state that any Measure 37 claims have  
been filed in Union County, the county in which his property is located. Again, the claims registry  
indicates that, as of October 11, 2005, at least fifteen claims were pending or resolved in Union  
County.

1 *Resources Comm'n*, 193 Or App 87, 97-98, 88 P3d 327 (2004) (WaterWatch had standing  
2 when it asserted that approval of permit "will harm" it), *vac'd on other grounds*, 339 Or 275, 119  
3 P3d 221 (2005); *Polk County v. DLCD*, 199 Or App 501, 507, 112 P3d 409 (2005) (plaintiff  
4 must assert that it "has suffered or will suffer a practical effect"). This court finds that the  
5 eventual harm to each of the individual plaintiffs and to Fishback Nursery provides each of them  
6 with standing to pursue this case.

7 Likewise, the county farm bureaus will be adversely affected if, because of Measure 37,  
8 land use regulations are not applied in their respective counties. The loss of land used for  
9 agricultural purposes, and the conflicts between residential and farm uses that will result in  
10 even more farmers leaving the farm business or moving to other areas, will necessarily result in  
11 fewer farm bureau members. This, in turn, will result in decreased revenues to the businesses.  
12 In addition to jeopardizing the viability of the farm bureaus, implementation of Measure 37 will  
13 impact the ability of the farm bureaus to advocate for the preservation of agricultural lands for  
14 agricultural uses.

15 Intervenor English contends that 1000 Friends lacks standing because its membership  
16 base has spikes and dips, but then returns to normal levels, and that Measure 37 does not  
17 affect its ability to advocate for land use planning. Although Measure 37 does not directly  
18 impact 1000 Friends' ability to advocate for land conservation and protection, the potential  
19 effectiveness of that advocacy is much reduced under Measure 37 because entities considering  
20 whether to implement new land use regulations must consider whether they will be able to  
21 compensate property owners for the property value lost to the regulation. Given the obvious  
22 fiscal impact of any future regulations, the regulation either will not be passed or will not be  
23 enforced. This impact on 1000 Friends' ability to fulfill its mission of promoting conservation  
24 and shaping land use regulation will greatly reduce the effectiveness of the organization and  
25 thus its ability to maintain current and attract new members. 1000 Friends has standing  
26 because it has identified plausible, actual, concrete ramifications to its interests from the  
27 enactment and application of Measure 37 if it remains law.<sup>4</sup> *Cf. Polk County v. DLCD*, 199 Or  
28 App 501, 506 (1000 Friends' philosophical and political disagreement with LCDS's decision was  
insufficient to provide it standing absent the identification of "any plausible, actual, concrete  
ramifications to its interests").

29 Plaintiffs, and each of them, have constitutional and statutory standing, as described  
30 above, and this court can reach all of plaintiffs' claims, except as specifically set forth below.  
31 Defendant Meredith's motion to dismiss on the ground that plaintiffs fail to present a justiciable  
32 controversy is denied.

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<sup>4</sup>It should be noted that 1000 Friends' showing in the current case is quite different from its  
posture in *1000 Friends of Oregon v. Clackamas County*, 194 Or App 212, 94 P3d 160 (2004).  
There, it was questionable whether a landowner would seek a permit and, if so, whether the county  
would decide that it did not fit within a permitted use or qualify for an exception, so there was no  
concrete injury. As noted, however, once a Measure 37 claimant files a claim with a public entity,  
the public entity must either pay the claimant or not apply the land use regulations. Because claims  
have already been filed, and there is evidence before this court that public entities in which claims  
have been filed do not intend to compensate claimants, 1000 Friends has shown that it will suffer  
harm.

1 **Plaintiffs' Motion for Summary Judgment**

2 Plaintiffs filed this action pursuant to ORS 28.020 and ORS 250.044 seeking a  
3 declaratory judgment that Measure 37 is unconstitutional, and as such, is invalid. Defendants  
4 filed motions for summary judgment asserting the measure's validity. Plaintiffs asserted several  
5 claims describing how the measure is unconstitutional, and the court has examined each in  
6 turn.

7 **Measure 37 impairs the Legislative Body's Plenary Power**

8 Plaintiffs claim that Measure 37 impermissibly intrudes on the inherent plenary, or police  
9 power of the legislative branch. The courts have struggled with how to best define these terms.  
10 Practically speaking, they are synonymous. We start with the premise that there is no "police"  
11 power set forth in the Oregon Constitution. As the Supreme Court has said, "the 'police power'  
12 does not refer to an independent source of legislative power itself; rather, it merely represents  
13 the legislature's general plenary power to legislate." *State v. Hirsch*, 338 Or 622, 638, 114 P3d  
14 1104 (2005) (citations omitted). Indeed, the general rule is that the legislature may freely  
15 exercise the plenary power, and that any limit on this exercise must appear in the constitution.  
16 See *Sherwood Sch. Dist. v. Washington County Educ. Serv. Dist.*, 167 Or App 372, 387, 6 P3d  
17 518 (quoting *Jory v Martin*, 153 Or 278, 284-85, 56 P2d 1093 (1936), *rev den*, 331 Or 361  
18 (2000).)

19 There is no question that the legislature may exercise its plenary power for the  
20 legislative ("police") purposes of protecting public welfare, health, and safety, including through  
21 the imposition of zoning regulations. See Or Const, Art IV, § 1; *Robertson v. City of Turner*,  
22 187 Or App 702, 707, 69 P3d 738, *rev den*, 336 Or 92 (2003); *Deupree v. Dep't of Transp.*, 173  
23 Or App 623, 629, 22 P3d 773 (2001) (citations omitted); *Scott v. State Highway Comm'n*, 23 Or  
24 App 99, 107, 541 P2d 516 (1975). Imposing land use regulations is, therefore, a valid exercise  
25 of the plenary power of the legislative body. See *Agins v. City of Tiburon*, 447 US 255, 261  
26 (1980) ("The specific zoning regulations at issue are exercises of the city's police power to  
27 protect the residents of Tiburon from the ill effects of urbanization. Such governmental  
28 purposes long have been recognized as legitimate" (citations and internal footnote omitted));  
*Miller v. Columbia River Gorge Comm'n*, 118 Or App 553, 556, 848 P2d 629 (1993) ("It is well  
established . . . that the police power encompasses the authority to regulate land, *inter alia*, for  
aesthetic purposes and for purposes of channeling development to existing urban areas – the  
two purposes that predominated here"). Indeed, this is the power relied on by the legislature  
when it enacted the first comprehensive land use planning bill in 1973. In its legislative  
findings, the legislature stated that, "Uncoordinated use of lands within this state threaten the  
orderly development, the environment of this state and the health, safety, order, convenience,  
prosperity and welfare of the people of this state," and that "the impact of proposed  
development projects, constituting activities of state-wide significance upon the public health,  
safety and welfare, requires a system of permits reviewed by a state agency to carry out state-  
wide planning goals and guidelines prescribed for application for activities of state-wide  
significance throughout this state." ORS 197.005 (1), (5) (1973).

1 The question raised by Measure 37 is whether the legislature (or here, the people acting  
2 through the initiative process) may impose limits on the legislative body's ability to use this  
3 power to regulate.<sup>5</sup> There is no provision in the Oregon Constitution that would permit such a  
4 limitation, and the Supreme Court has noted that a legislative body may not limit or contract  
5 away its authority to exercise this power. See *Northern Pac. Ry. Co. v. Duluth*, 208 US 583,  
6 598 (1908) (contract limiting police powers was void as against public policy); *Stone v.*  
7 *Mississippi*, 101 US 814, 817 (1879) (the "legislature cannot bargain away the police power of a  
8 state"); *Hughes v. State*, 314 Or 1, 14, 838 P2d 1018 (1992) (the "state may not contract away"  
9 its police, or plenary, power (citation omitted)). Thus, if Measure 37 prohibits the legislative  
10 body from exercising its plenary power to regulate for public welfare, health, or safety, it is an  
11 unconstitutional curtailment of legislative power.

12 Measure 37 does not purport to restrict the power of government to enforce current land  
13 use regulations or the power of legislative bodies to enact new ones. There is no question that  
14 the land use regulations themselves are valid, and no claim that the regulations rise to the level  
15 of a taking, which would require compensation.<sup>6</sup> Instead, Measure 37 requires the government  
16 to pay if it wants to enforce valid, previously enacted, land use regulations, *i.e.*, it must pay to  
17 govern. This the legislative body cannot do, and the possibility that a later legislature could  
18 decide to repeal that condition on enforcement does not make it permissible. Such a limit on  
19 the power to regulate is a limit on the plenary power. If such a law were permissible, any party  
20 affected, in any way, by a regulation could seek to enact a law similar to Measure 37 that would  
21 require the entity that attempts to enforce the regulation to either pay the costs of complying  
22 with the regulation, or not to enforce the regulation. For example, by future regulation, public  
23 entities could be forced to choose between enforcing Department of Environmental Quality  
24 regulations or paying citizens whose cars do not meet emissions requirements for the cost to  
25 repair their cars, between enforcing school attendance policies and paying parents for the costs  
26 of clothing, food, and other privately borne costs associated with sending their children to  
27 school. These potential outcomes make clear that a government cannot be forced to choose  
28 between exercising its plenary power to regulate for public welfare, health or safety, or paying  
private parties to comply with the law. Defendants point out that Measure 37 prohibits the  
waiver of regulations restricting or prohibiting activities for the protection of public health and  
safety, but the statute carves out no protection for government's plenary power to regulate land  
use. In fact, it eviscerates that power.

The state asserts that a just compensation requirement is permissible because  
legislation often has a fiscal impact. The payments required by Measure 37 inure to the benefit

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<sup>5</sup>A local legislative body's power to regulate may be preempted by the state, or the state by  
the federal government, see *AT & T Commun. of the Pac. Northwest, Inc. v. City of Eugene*, 177  
Or App 379, 394-95, 35 P3d 1029 (2001), but the current issue raises a different question: whether  
a legislature may, in effect, preempt itself.

<sup>6</sup>Amicus Curiae Pacific Legal Foundation asserts that the people enacted Measure 37 to  
combat perceived abuses of a public entity's ability to enact non-compensable regulations. Even  
if that is the case, those perceived abuses must be addressed regulation by regulation under the  
Takings Clause (Oregon Constitution Article I, § 18 and United States Constitution Amendment V),  
not in an across-the-board limitation of the plenary power.

1 of individuals who seek *not* to have the regulations enforced against them. That is quite  
2 different from the circumstances cited by the state, such as enforcing licensing and permitting  
3 requirements, providing services to needy citizens, regulating public education, and enforcing  
4 criminal laws.<sup>7</sup> While the government may be required to choose between enforcing those laws  
5 and paying costs associated with them, the payments are not to individuals for the purposes of  
6 ensuring that they will conform their conduct to the law. Rather, they are general expenses that  
7 are a by-product of the laws, not separately (and later) enacted restrictions on enforcement.  
8 That the government may be required to make that choice does not limit its plenary power in  
9 the same way that Measure 37, which specifies that government must either pay, or not enforce  
10 regulations enacted pursuant to its plenary power, does. There is a difference between  
11 legislation such as that cited by the state that carries with it a generally applicable fiscal impact  
12 and the current legislation, which imposes a fiscal impact after the legislation has been enacted,  
13 only when the government seeks to enforce the regulation, and which requires payment to  
14 private parties to abide by the law, thus rendering the legislative body impotent to regulate for  
15 the public good.<sup>8</sup>

16 Because Measure 37 currently imposes limitations on government's exercise of plenary  
17 power to regulate land use in Oregon, it is unconstitutional. Although Measure 37 contains a  
18 severability provision stating that if any portion of it is found invalid, the remaining portions "shall  
19 remain in full force and effect," Measure 37, § 13, there is no way to sever the unconstitutional  
20 portion of Measure 37 from the remainder. The requirement that a public entity pay property  
21 owners to comply with land use restrictions is the crux of Measure 37 and was the intention of  
22 the voters who enacted it. Once that unconstitutional provision is severed from the remainder  
23 of the Measure, "[t]he remaining parts, standing alone, are incomplete and incapable of being  
24 executed in accordance with the legislative intent," ORS 174.040(3), because the portion of the  
25 measure providing that a public entity may choose to "modify, remove, or not . . . apply" the  
26 land use regulation "in lieu of payment of just compensation," Measure 37, § 8, has no effect if  
27 the public entity cannot be required to pay just compensation. Consequently, there is no  
28 portion of Measure 37 that may remain effective.<sup>9</sup>

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<sup>7</sup>The state also cites the example of taking private property for public use. In that circumstance, the state is paying for the value of what it receives, not paying for the privilege of ensuring public welfare, health and safety.

<sup>8</sup>Intervenor English would have this court strike plaintiffs' plenary power argument because, she asserts, it was not presented in plaintiffs' First Amended Complaint. As she points out however, ¶ 50 of the First Amended Complaint alleges that Measure 37 intrudes on the "inherent, plenary police power of the legislative branch of government by requiring government entities to pay to enforce the law," the exact contention plaintiffs make in their motion for summary judgment.

<sup>9</sup> See *Deras v. Myers*, 272 Or 47, 52, 535 P2d 541 (1975) (noting that two statutes were so intertwined "that they must stand or fall together"); *Advocates for Effective Regulation v. City of Eugene*, 176 Or App 370, 376-77, 32 P3d 228 (2001) (interpreting severability clause).

1 Measure 37 violates Oregon Constitution Article I, § 20, Equal Privileges and  
2 Immunities

3 Article I, § 20, of the Oregon Constitution provides that “No law shall be passed granting  
4 to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall  
5 not equally belong to all citizens.” This section is violated if a law treats a “true class” differently  
6 from other classes. See *Tanner v. Oregon Health Sciences Univ.*, 157 Or App 502, 520, 971  
7 P2d 435 (1998). A “true class,” in turn, is a class that is “defined in terms of characteristics that  
8 are shared apart from the challenged law or [government] action,” as opposed to those created  
9 by the law or action. *Id.* at 520-21. True classes include distinctions based on past or present  
10 residency, legitimacy and military service. *Id.* at 521. If a class is “true” and it is a suspect  
11 class, then the challenged law or regulation “is subject to particularly exacting scrutiny.” *Id.* at  
12 522. Suspect class characteristics are those such as sex, race, sexual orientation, alienage,  
13 and religious affiliation – characteristics that are “historically regarded as defining distinct,  
14 socially recognized groups that have been the subject of adverse social or political stereotyping  
15 or prejudice.” *Id.* at 522-24. If, on the other hand, the affected “true class” is not suspect, then  
16 the law receives rational basis review. *Id.* at 523.

17 Here, the classes are defined by when a property owner subject to land use regulations  
18 obtained the property: those that obtained their properties before the land use regulations  
19 became effective (pre-owners), and those that obtained their properties afterward (post-  
20 owners). This class distinction will continue to apply to any new land use regulations enacted  
21 after Measure 37 became effective. The pre-owners are treated differently from the post-  
22 owners, because the pre-owners can obtain a benefit not available to post-owners: either  
23 compensation for the “reduction in fair market value of the affected property interest resulting  
24 from enactment or enforcement of the land use regulation,” or the modification, removal, or  
25 non-application of the land use regulation. Measure 37, §§ 2, 8. This distinction between pre-  
26 and post-owners exists, and is defined, separately from Measure 37, because the distinction  
27 would exist whether or not Measure 37 was enacted. Furthermore, there is no way for those  
28 who are of the post-owner class to “bring himself or herself within the favored class on equal  
terms.” *State v. Clark*, 291 Or 231, 240-41, 630 P2d 810 (1981).

The class distinction is not, however, suspect. Measure 37 pits two groups of property  
owners, differentiated only by the date they obtained their property, against each other. There  
is no historical discrimination based on the date of property ownership. *Cf. Cipriano v. City of*  
*Houma*, 395 US 701 (1969) (in voting franchise cases, distinctions based on whether voter  
owns property subject to strict scrutiny equal protection analysis). Thus, rational basis review  
applies and this court must determine whether the distinction between pre- and post-owners is  
reasonably related to a legitimate state interest. See *City of Klamath Falls v. Winters*, 289 Or  
757, 772, 619 P2d 217 (1980).

The purpose of Measure 37 is to compensate property owners for the “reduction in fair  
market value of [the] affected property interest.” Measure 37 Ballot Title. Because the  
compensation requirement under Measure 37 impedes the exercise of the police power, as  
discussed above, it is not a legitimate state interest. Even if it were, however, the means  
chosen to determine the amount of compensation is not reasonably related to the interest. The

1 value of “just compensation” under the Measure is determined not based on the diminution in  
2 value that occurred on the date the land use regulation was adopted and the pre-owner lost his  
3 or her rights to develop the property, adjusted to current value, nor even on the diminution in  
4 value that occurred if and when the pre-owner sought but was denied the right to develop the  
5 property, adjusted to the current value, but instead is based on what the property would be  
6 worth today, but for the land use regulation.

7 The adjusted potential value of many of the properties affected by Measure 37 has  
8 greatly increased since 1973, when the first significant land use regulations were enacted. See  
9 Senate Bill 100 (1973) (codified as amended at ORS Chapter 197). Urban growth boundaries  
10 have expanded, and the populations of Oregon’s cities are closer to properties that, in 1973,  
11 were well removed from urban areas – and thus would have been worth little to property  
12 developers. Moreover, Oregon’s population has grown, which creates an increased demand for  
13 property. Thus, permitting pre-owners to recover based on what their properties are worth  
14 today, instead of at the time the land use regulations were enacted and the injury to the owners  
15 was thus incurred, has no rational relation to the aim of Measure 37 of compensating property  
16 owners for the reduced fair market value of their property interest. The distinction between pre-  
17 and post-owners is not reasonably related to a legitimate state interest and, therefore, is  
18 unconstitutional.

19 Moreover, this distinction also treats pre-owners who have owned their properties for  
20 many years differently from those who more recently obtained their properties and are entitled  
21 to relief from more recently enacted land use regulations. Because, in all likelihood, more  
22 recent pre-owners paid more for their property at the time they bought it, they will not receive a  
23 comparative amount of compensation – their basis for compensation will be higher than that of  
24 pre-owners who purchased their property earlier. Thus, even though both classes could be  
25 compensated in terms of what the property would be worth today without the relevant  
26 restrictions, the more recent pre-owner will not receive the same “windfall.”

27 The state contends that the rational basis for the distinction between pre- and post-  
28 owners is that post-owners took their property knowing of the limitations of use on the property  
and therefore the cost of the property took into account the limitations. If they were now  
compensated under Measure 37, the state contends, they would receive a windfall. The  
assertion that some post-owners received a discount on their property is tenuous at best. For  
most of the properties affected by Measure 37, the land use regulations would have had little  
effect on purchase price because, as noted, the properties were too far removed from urban  
areas to be desirable for residential subdivisions or other non-farm use. In addition, the  
proposed rational basis does not take into account those property buyers who were willing to  
pay more for land because it was subject to the land use regulations – and surrounded by land  
also subject to them, or who purchased in reliance on the regulations. Nor does the Measure  
afford any relief to the latter class whose property values may diminish dramatically as a result  
of waivers granted to adjoining landowners.

For the above reasons, Measure 37 violates the privileges and immunities clause of  
Article I, § 20, of the Oregon Constitution, because it does not serve a legitimate state interest  
and, in any event, the means chosen to serve the state’s interest are not rationally related to

1 that interest. Once that unconstitutional provision is severed from the remainder of the  
2 Measure, “[t]he remaining parts, standing alone, are incomplete and incapable of being  
3 executed in accordance with the legislative intent,” ORS 174.040(3), because the portion of the  
4 measure providing that a public entity may choose to “modify, remove, or not . . . apply” the  
5 land use regulation “in lieu of payment of just compensation,” Measure 37, § 8, has no effect if  
6 the public entity cannot pay the compensation without running afoul of Article I, § 20.  
7 Consequently, there is no portion of Measure 37 that may remain effective. See fn. 9, above.

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**Measure 37 violates Oregon Constitution Article I, § 22, Suspension of Laws**

Article I, § 22, of the Oregon Constitution provides that, “The operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly.”

The State asserts that Measure 37 is not a suspension of the laws, because all land use regulations remain in effect, and a decision not to apply the regulation to a specific property is not a suspension but rather is a waiver, comparable to the granting of a variance. Plaintiffs assert that the suspension cannot be upheld because it does not suspend the laws for all persons, but rather authorizes person-specific suspensions for persons who owned their properties before the land use regulations became effective. Plaintiffs contend that Measure 37 operates differently from the granting of a variance because variances are only available pursuant to fixed standards that are equally available to all properties, whereas, under Measure 37, whether land use laws apply is determined based on who is the owner of the property and when that owner acquired the property.

While land use regulations remain effective under Measure 37, and new ones may be implemented, Measure 37 authorizes the suspension of those laws for certain, specified property owners – those who obtained their property before the land use regulations became effective. The suspension at first glance appears similar to the granting of a variance, but it is materially different. A variance may be granted only when certain, specified, conditions exist. See, e.g., Salem Revised Code § 115.010 (noting, in portion of code providing for variances, that “Each area of land is, to some degree, unique as to its suitability for and constraints on development” and that it was the intent of the variance chapter “to provide flexibility, adaptability and reasonableness in the application and administration of this zoning code *where special conditions exist*” (emphasis added)); Salem Revised Code § 115.020 (stating four criteria that must be met before a variance may be granted); *deBardelaben v. Tillamook County*, 142 Or App 319, 322, 922 P2d 683 (1996) (citing the four requirements that must be met in Tillamook County before a variance may be issued); *Atwood v. City of Portland*, 55 Or App 215, 219, 637 P2d 1302 (1981) (citing two criteria under which a “major variance” could be granted in Portland); *Lovell v. Planning Comm’n of Independence*, 37 Or App 3, 6, 586 P2d 99 (1978) (noting that the “extraordinary circumstances” that could justify granting a variance “arise out of conditions inherent in the land, and do not apply generally in the same zone” (internal citation omitted)).

Under Measure 37, however, every property owner who owned before the land use regulations became effective – no matter the circumstances of the particular piece of property or what use the owner seeks to make of it – is entitled to an exemption from virtually any land

1 use restrictions enacted after the owner acquired the property, if the public entity does not  
2 provide current market value compensation.<sup>10</sup> Measure 37 also differs from a variance because  
3 a property owner whose application for a variance is denied is not entitled to compensation. A  
4 property owner who makes a claim under Measure 37 is entitled to either compensation or to  
5 have the land use regulation not apply. This provision distinguishes Measure 37 from a  
6 variance. It authorizes the non-application of land use regulations to specified persons (those  
7 who owned their properties before the land use regulations became effective) at the option of  
8 the public entity that imposed the regulations.

9 Because Measure 37 was enacted by the voters through the initiative process, a  
10 legislative power reserved to the people, see Or Const Art IV, § 1, the suspension is by the  
11 authority of the Legislative Assembly. However, the suspensions authorized by Article IV, § 1,  
12 must be construed in light of other relevant constitutional provisions. See *State v. Hirsch*, 338  
13 Or 622, 634, 114 P3d 1104 (2005) (considering other provisions of the constitution in  
14 constitutional interpretation); *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) (“There  
15 are three levels on which [a] constitutional provision must be addressed: Its specific wording,  
16 the case law surrounding it, and the historical circumstances that led to its creation”). Article I,  
17 § 20, which appears in the constitution before the section currently at issue, states that  
18 privileges and immunities must be granted equally to all citizens. The suspension clause must  
19 not, therefore, be capable of use to provide a privilege or immunity that is not available to all.

20 Measure 37 attempts to provide property owners who owned their property before land  
21 use regulations affecting it became effective with an immunity from the regulations or payment  
22 for the diminution in value caused by the regulations. As previously discussed, treating these  
23 owners differently from property owners who acquired their property after the regulations  
24 became effective and who cannot obtain the same immunity or payment, violates the privileges  
25 and immunity clause. Therefore, Measure 37 violates the suspension clause of the Oregon  
26 Constitution. This unconstitutional portion of the Measure cannot be severed. See ORS  
27 174.040(3); fn. 9, above.

### 28 **Measure 37 does not violate Oregon Constitution Article IV, § 24, Sovereign Immunity**

29 Measure 37, § 6, provides a cause of action to a property owner if a land use regulation  
30 continues to apply to the owner’s property more than 180 days after the owner made written  
31 demand for compensation pursuant to Measure 37. This section thus purports to waive  
32 sovereign immunity for these claims. Oregon Constitution Article IV, § 24, provides that the  
33 state may waive its sovereign immunity “as to all liabilities originating after, or existing at the  
34 time of the adoption of this Constitution.”

35 Plaintiffs assert that the “liabilities” referred to do not include liabilities for economic  
36 consequences of regulation. Article IV, § 24, is not so limited. Instead, it permits the state to  
37 decide to waive its sovereign immunity to any liabilities that the state incurs. It does not limit the

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38 <sup>10</sup>The exceptions are not material to this decision.

1 range of liabilities that the state may choose to incur, and indeed, contemplates, through the  
2 use of the term “originating after,” that the state may choose to impose new liabilities on itself.  
3 As the Oregon Supreme Court explained in *Hale v. Port of Portland*, 308 Or 508, 517, 783 P2d  
506 (1989) (internal citations omitted):

4 The Oregon Constitution allocates power. Article IV, section 24, allocates the  
5 power to waive that sovereign immunity to the legislature, not to the courts.

6 The section also specifies the form in which the immunity may be waived, if at  
7 all. Prior to statehood, suits against the territorial government were sometimes  
8 allowed by special legislative act. Article IV, section 24, modifies this procedure  
9 to require that any waiver of immunity apply generally and that the legislature no  
10 longer may allow for recovery by special act.

11 Thus, at the time the provision was enacted, the legislature contemplated that the state may  
12 choose to impose new liabilities on itself, and to waive its sovereign immunity as to those  
13 liabilities. See *State v. Hirsch*, 338 Or 622, 631, 114 P3d 1104 (2005) (analysis of a  
14 constitutional provision “consists of an examination of the text of the constitutional provision, the  
15 case law surrounding it, and the historical circumstances that led to its creation”). Here, the  
16 state, through the initiative process, has chosen to incur the liability of a possible suit brought by  
17 a Measure 37 claimant against whom a land use regulation continues to apply after the  
18 claimant has demanded compensation. This portion of Measure 37 does not violate Article IV,  
19 § 24, of the Oregon Constitution.

#### 20 **Plaintiffs' Article I, § 7, Freedom of Speech claim is not justiciable**

21 Measure 37 provides that if a property owner seeks to use the property for the purpose  
22 of selling pornography or permitting nude dancing, that owner may not seek compensation  
23 under the Measure. Measure 37, § 3(D). None of the plaintiffs have stated that they desire to  
24 use their properties for these purposes and would be prohibited from doing so by this portion of  
25 Measure 37. Consequently, no plaintiff has established that there is a justiciable controversy as  
26 to whether this portion of Measure 37 is constitutional, because a decision on this issue would  
27 not have a practical effect on any current plaintiff.

28 Even if this court were to find this portion of Measure 37 unconstitutional, because the  
Measure has a severability clause, the only available remedy would be to leave the Measure in  
effect and sever this exception from it. See ORS 174.040. Because only the remainder of the  
measure and not this exception have any effect on the plaintiffs, severing it from the Measure  
would not have the requisite practical effect on a plaintiff. For these reasons, this court cannot  
consider this portion of plaintiffs' claim. See *Utsey v. Coos County*, 176 Or App 524, 539-44,  
32 P3d 933 (2001) (“Without some demonstration that the challenged agency action will have a  
practical impact on the person challenging it, [a case asserting that the action violated the law]  
amounts to no more than a request for an unconstitutional advisory opinion”), *review dismissed*,  
335 Or 217 (2003).

1 Plaintiffs contend that, because this court has jurisdiction over a portion of their  
2 declaratory judgment action, it may consider all the matters in this proceeding. Even when a  
3 case presents one justiciable controversy, not all issues presented may be justiciable. See  
4 *Brown v. Oregon State Bar*, 293 Or 446, 451, 648 P2d 1289 (1982) (circuit court opinion on  
5 whether proposed conduct would be unethical under disciplinary rules would be advisory, so  
6 that issue was non-justiciable even though other question presented to court was justiciable).  
Consequently, this court rejects plaintiffs' arguments that this court may reach plaintiffs' free  
speech claim even though no plaintiff has shown a practical effect under the complained-of  
portion of Measure 37.

7 **Measure 37 does not violate Oregon Constitution Article I, § 5, Compensation to**  
8 **Religious Institutions**

9 Because Measure 37 applies to religious institutions as property owners, rather than in  
10 their functions as religious institutions, it does not violate Article I, § 5, of the Oregon  
11 Constitution. See *Dickman v. School Dist. No. 62C*, 232 Or 238, 255-56, 366 P2d 533 (1961).

12 **Oregon Constitution Article III, § 1, Separation of Powers**

13 Article III, § 1, provides for the separation of powers into the legislative, executive, and  
14 judicial branches, and specifies that "no person charged with official duties under one of these  
15 departments, shall exercise any of the functions of another, except as in this Constitution  
16 expressly provided." Plaintiffs assert that Measure 37 intrudes on the executive power to  
17 enforce the law because it permits legislative bodies to decide whether to enforce or not to  
18 apply generally-applicable land use regulations, and that it provides inadequate procedural  
19 safeguards for non-claimants against arbitrary decisions. The procedural due process claim will  
20 be addressed separately. Plaintiffs also contend that Measure 37 permits the legislative body  
21 to delegate to the public entities responsible for implementing land use regulations the power to  
22 exempt a specific person from those regulations, but that such delegation is improper because  
23 the legislative body does not have such a power itself.<sup>11</sup>

24 **1. Intrusion on the Executive**

25 To the extent Measure 37 delegates to public entities the ability to choose between  
26 enforcing the land use regulations and compensating eligible landowners, this is a permissible  
27

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28 <sup>11</sup>In addition, plaintiffs contend that Measure 37 runs afoul of the separation of powers  
provision because it directs courts to narrowly construe the "public nuisance" exception and  
intrudes on the constitutional requirement that the legislature hold biennial sessions. Directing  
courts in how to construe an exception is not an intrusion on the judiciary, but rather is a  
permissible statement of legislative intent. See, e.g., *Marquam Inv. Corp. v. Beers*, 47 Or App 711,  
722, 615 P2d 1064 (1980) (statutory presumption did not violate separation of powers); ORS  
10.090 ("this section shall not be construed to alter or affect . . ."); ORS 28.130 ("person' . . . shall  
be construed to mean . . ."); ORS 30.140 ("no provision of this section shall be construed to apply  
to a 'railroad' . . ."); ORCP 1 (directing how the civil procedure rules should be construed).  
Furthermore, Measure 37 does not change the fact that the legislature will continue to hold biennial  
sessions, and can convene in a special session. See Oregon Constitution Article IV, §§ 10, 10A.

1 delegation. A legislature may delegate its authority, and there is no separation of powers  
2 problem unless one department is performing the functions of another. See *Rooney v.*  
3 *Kulongoski*, 322 Or 15, 28, 902 P2d 1143 (1995). The delegation here provides public entities,  
4 in the exercise of their executive powers, with direction in how to enforce land use regulations:  
5 either enforce them and pay landowners who acquired their properties before the regulations  
6 became effective “just compensation,” or modify, remove, or do not apply the regulations. The  
7 legislature has decided that these are the available options and has left it to the public entities  
8 to decide which option to use. This is not an improper delegation, because a reviewing court  
9 will be able, as required in separation of powers analysis, to determine whether the actions of  
10 the public entities have honored or departed from the general policy indicated by the legislature.  
11 See *Megdal v. Oregon State Bd. of Dental Exam’rs*, 288 Or 293, 297, 605 P2d 273 (1980).

8 Nor is this an encroachment on the executive’s power to enforce the law. The  
9 legislature has determined and set forth that these are the options that may be enforced, and  
10 thus limited the executive’s discretion. That is the legislature’s duty – to enact the laws and, if  
11 desired, to set limits on their enforcement. Cf. *State ex rel. Ray Wells, Inc. v. Hargreaves*, 306  
12 Or 610, 615 n 2, 761 P2d 1306 (1988) (by providing rules for disqualification, legislature  
13 “exercised its own function – legislation”). Conversely, the executive branch is required to “take  
14 care that the Laws be faithfully executed.” Oregon Constitution, Article V, § 10. Even though it  
15 appears to do so practically, technically, Measure 37 does not inhibit the executive’s power or  
16 responsibility to enforce the laws, but instead directs how they should be enforced. Thus,  
17 Measure 37’s directive related to the enforcement of land use regulations does not violate  
18 separation of powers principles. Cf. *State ex rel. Frohnmayer v. Oregon State Bar*, 307 Or 304,  
19 310, 767 P2d 893 (1989) (“the exercise of power constitutionally assigned to one branch will  
20 often have a direct impact on another branch of government. The power which may be  
21 exercised in the absence of legislation by one branch – for example, the Judicial Department –  
22 may nevertheless be subject to statutory regulation if the Legislative Assembly enacts a law.  
23 But no violation of Article III, section 1 occurs unless the powers or functions of one  
24 governmental branch are performed by a person performing the duties of a different branch”).

## 19 2. Delegation of Authority

20 To the extent Measure 37 purports to permit the legislature to delegate to public entities  
21 a limit on the legislature’s plenary power, the authority to treat a class of property owners (pre-  
22 owners) differently from other property owners (post-owners), and the suspension of land use  
23 regulations for a specified group of property owners, it is, as described earlier, unconstitutional,  
24 because a legislature cannot delegate power it does not possess. See *Bowsher v. Synar*, 478  
25 US 714, 726 (1986) (in analyzing federal separation of powers doctrine, noting that “Congress  
26 cannot grant to an officer under its control what it does not possess”).

### 25 Measure 37 violates the United States Constitution, Fourteenth Amendment Due 26 Process Clause

#### 27 1. Procedural Due Process

28 Measure 37 provides no right of review to persons such as plaintiffs, who are not directly

1 involved in the determination of whether a claimant should be given “just compensation” or the  
2 land use regulations should not apply to the claimant’s land. For claims filed with and decided  
3 by a state agency, the Oregon Administrative Procedures Act provides that “any person  
4 adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to  
5 judicial review of a final order.” ORS 183.480. A person is “affected or aggrieved” if:

6 (1) the person has suffered an injury to a substantial interest resulting directly  
7 from the challenged governmental action; (2) the person seeks to further an  
8 interest that the legislature expressly wished to have considered; or (3) the  
9 person has such a personal stake in the outcome of the controversy as to assure  
10 concrete adverseness to the proceeding. The legislature has not granted  
11 standing under ORS 183.480(1) to those persons who merely are dissatisfied  
12 with the agency’s order, or who have only an abstract interest . . . in the question  
13 presented, or who are mere bystanders.

14 *People for the Ethical Treatment of Animals v. Institutional Animal Care*, 312 Or 95, 101-02, 817  
15 P2d 1299 (1991) (internal quotations omitted). Thus, to the extent persons such as plaintiffs  
16 have standing to pursue this case, they, as well as a Measure 37 claimant, would also be able  
17 to appeal a decision by a public entity granting or denying a Measure 37 claim after the fact.  
18 Measure 37 claims decided by local governments are also subject to post-decision review. See  
19 ORS 34.010, 34.040.

20 The review procedure provided is, however, “too little, too late.” Procedural due process  
21 requires that the procedure furnish “adequate *safeguards* to those who are affected by the  
22 administrative action.” *Warren v. Marion County*, 222 Or 307, 314, 353 P2d 257 (1960) (“the  
23 important consideration is not whether the statute delegating the power expresses *standards*,  
24 but whether the procedure established for the exercise of the power furnishes adequate  
25 *safeguards* to those who are affected by the administrative action” (emphasis in original).  
26 Before a government may deprive individuals of their liberty or property interests, it must  
27 provide them with “the opportunity to be heard at a meaningful time and in a meaningful  
28 manner.” *Mathews v. Eldridge*, 424 US 319, 332 (1976) (internal quotation omitted). “[T]he  
process is flexible and calls for such procedural protections as the particular situation  
demands.” *Morrisey v Brewer*, 408 US 471, 481 (1972). Of course, a pre-deprivation notice  
and hearing is not due in every situation See *id.* The court must consider the “private interest  
that will be affected,” “the risk of an erroneous deprivation” of that interest, and “the probable  
value, if any, of additional or substitution procedural safeguards.” *Mathews v Eldridge*, 424 US  
at 335.

29 Plaintiff Adams has a protected property interest entitling him to due process.  
30 Defendant DAS has already decided not to enforce land use regulations on Hoff’s property,  
31 which is proximate to Adams’ property. The non-application of the regulations has caused  
32 irreparable harm because the wildlife that used Hoff’s property has been displaced and the  
33 watershed has been affected, leading to a decrease in the serenity and desirability of the area,  
34 including Adams' property. In addition, as development on the property continues, and in the  
35 event land use regulations are not applied to the second property owner near Adams who filed  
36 a Measure 37 claim, the adverse impact will continue irreversibly. Thus, the non-application of

1 the regulations has materially affected Adams' property interests and will continue as each  
2 request is processed.<sup>12</sup>

3 Because of the likelihood that non-qualified property owners near or adjacent to a  
4 Measure 37 claimant's property will suffer irreparable harm, as shown above, those property  
5 owners must be given notice and an opportunity to be heard *before* a public entity decides the  
6 Measure 37 claim. If, as proposed by Intervenor English, the property owner is provided a post-  
7 deprivation hearing, that hearing cannot be "meaningful." Once a land use regulation is not  
8 applied pursuant to Measure 37, development begins. As just one example, this will mean in  
9 many cases, as in Adams' case, the loss of wildlife areas. If the public entity is later found to  
10 have improvidently decided not to apply the land use regulations, the aggrieved party has little  
11 solace, since the harm the party sought to prevent will have already occurred and will be  
12 difficult, if not impossible, to remedy: among other harms, the land will already be bulldozed,  
13 houses may be in the process of being built or even be completed, and wells may be drilled.

14 The serious and imminent risk of an erroneous deprivation of property interests that are  
15 impacted by a government entity's decision on a Measure 37 claim, and the fact that a pre-  
16 deprivation hearing, with notice and the opportunity of property owners near the Measure 37  
17 claimants' land to be heard could prevent the improvident exemption or nonapplication of land  
18 use rules, obligates governments to provide property owners near a Measure 37 claimant's  
19 property with notice and the opportunity to be heard before the public entity decides the claim.  
20 The state has already provided for such notice and hearing when it is the entity to which the  
21 claim applies. See OAR 125-145-0080.<sup>13</sup> That said, neither the Measure nor the regulation  
22 afford the property owner any modicum of relief. Assuming property ownership is established,  
23 and the offending regulation post-dates the date of acquisition, Measure 37 does not permit any  
24 discretion to deny a waiver request (excepting to pay the landowner to comply with the law,  
25 which governments are financially unable to do.) Thus, at the very least, the procedural due  
26 process right of Adams has been violated because the procedural protections are inadequate if  
27 they exist at all.

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28 <sup>12</sup>Individual plaintiffs Vanasche and Fishback, and corporate plaintiff Fishback Nursery, Inc.,  
also have protected property interests entitling them to due process. Since the record is silent as  
to whether Washington County, which will consider the Measure 37 claims that were filed near their  
properties, provides notice and an opportunity to be heard to proximate landowners, the Court  
cannot decide their claim they have been deprived of procedural due process herein. They are  
included in the court's other determinations.

<sup>13</sup>Plaintiffs do not contend that the notice and opportunity to be heard pursuant to OAR 125-  
145-0080 is insufficient.

Clackamas County, the local public entity that considered the Hoff Measure 37 claim that  
directly affected Adams' interests, and that will consider the other claim affecting his interest, has  
no such provision. See Clackamas County Code § 2.08.010 to 2.08.030 (authorizing Measure 37  
claim processing but not providing for notice and an opportunity to be heard to persons who own  
property near a claimant's property). Indeed, although Adams was present at the hearing on the  
Hoff claim, there is no evidence in the record that he was provided the opportunity to be heard  
before the claim was granted (Adams Depo, p 33).

1                                   **2.        Substantive Due Process**

2                    Plaintiffs contend that Measure 37 violates substantive due process under the  
3 Fourteenth Amendment of the United States Constitution because it does not serve a legitimate  
4 state interest and, in any event, the valuation scheme for compensation in the measure has no  
rational relationship to the state's interest.

5                    The state contends that plaintiffs are not entitled to substantive due process protection  
6 because Measure 37 does not impede any fundamental rights. Substantive due process  
7 protection is available to protect a person from the arbitrary deprivation of the fundamental  
8 rights of life, liberty or property. See *Jeffries v. Turkey Run Consol. Sch. Dist.*, 492 F2d 1, 3-4  
9 (7th Cir 1974); see also *Tennessee v. Lane*, 541 US 509, 522-23 (2004) (Due Process Clause  
10 of the Fourteenth Amendment protects the right of access to the courts); *Planned Parenthood  
11 of Southeastern Pa. v. Casey*, 505 US 833, 851 (1992) (listing liberty interests protected by  
12 substantive due process); *Port of Coos Bay v. City of Coos Bay*, 23 Or App 8, 16, 541 P2d 156  
13 (1975) (“The United States Supreme Court since *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct.  
14 505, 78 L.Ed. 940 (1934), has consistently rejected challenges that a particular state or  
15 municipal regulatory policy deprives the complainant of substantive due process guaranteed by  
16 the Fourteenth Amendment, unless grounded on a right protected by another amendment such  
17 as the First, Fourth or Fifth”).

18                    As noted above, plaintiffs risk losing their property interest, in that their property values  
19 will likely decrease if development is permitted on lands surrounding theirs, but the restrictive  
20 land use regulations continue to apply to the plaintiffs. Thus, they are entitled to substantive  
21 due process protection based on their right not to be deprived of their property interests.  
22 Plaintiffs’ right is not, however, fundamental, *i.e.*, they do not have the right to have their  
23 property value maintained at a certain level. In such a circumstance, this court’s review is more  
24 deferential: “we do not require that the government’s action actually advance its stated  
25 purposes, but merely look to see whether the government *could* have had a legitimate reason  
26 for acting as it did.” *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F3d 56, 66 (9th  
27 Cir 1994). Here, the government, through the initiative process, *could not* have had a legitimate  
28 reason for enacting Measure 37, because, as described earlier, the compensation provision of  
Measure 37 impedes the exercise of the plenary power. As such, Measure 37 violates plaintiffs’  
substantive due process rights.

29                    **ORDER**

30                    Plaintiffs' motion to amend the First Amended Complaint to conform to the evidence  
31 presented with Plaintiffs' Motion for Summary Judgment and related submissions is allowed.

32                    Intervenor Meredith’s motion to dismiss is denied. All individual plaintiffs, corporate  
33 plaintiff Fishback Nursery, Inc., Clackamas County Farm Bureau, Linn County Farm Bureau,  
34 Washington County Farm Bureau, Marion County Farm Bureau, Yamhill County Farm Bureau,  
35 and 1000 Friends of Oregon have constitutional standing to pursue this suit.

1 The court being fully advised in the premises finds that there is no genuine issue as to  
2 any material fact and that Plaintiffs are entitled to judgment as a matter of law. The court  
3 grants plaintiffs' motion for summary judgment on the grounds that Measure 37 intrudes on the  
4 plenary power of the legislative body; violates the equal privileges and immunities clause of the  
5 Oregon Constitution, Article I, § 20; violates the suspension of laws clause of the Oregon  
6 Constitution, Article I, § 22; violates the separation of powers clause of the Oregon Constitution,  
7 Article III, § 1, to the extent the legislative branch purports to delegate to public entities powers  
8 it does not possess; and violates procedural and substantive due process, United States  
9 Constitution Fourteenth Amendment.

7 The court denies all of the parties' motions that it does not grant. While the court found  
8 the Measure did not violate the constitution in some respects, in light of the court's decision,  
9 defendants' motions for summary judgment are denied. Now, therefore,

9 IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment on the grounds  
10 that Measure 37 as codified is unconstitutional and invalid is granted. Plaintiffs are awarded  
11 attorney fees, costs and disbursements. Counsel for Plaintiffs shall prepare a judgment.

12 Dated this \_\_\_\_ day of October, 2005.

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15 MARY MERTENS JAMES  
16 Circuit Court Judge  
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