THIS LAND IS *MY* LAND

In the struggle for Washington's soul, both sides of the property-rights debate agree on one thing: Oregon started it

By Eric de Place • *Illustration by Stan Shaw*

There's a battle brewing in Washington state. Are we children of the libertarian Wild West, where anything goes? Or are we heirs to Ecotopia, where forests and salmon streams are prized above development? The answer goes to our core values—and remains to be seen.

Maybe no state is as Janus-faced as ours. The East-West divide of the Cascade Curtain has long been Washington's homegrown version of the red state–blue state divide that is the current darling of the national punditry. The East looks to the West, and sees arrogant urban liberals; the West thinks of its neighbors to the East as dim-witted rural conservatives. From time to time, a handful of legislators and citizens seriously propose splitting the state in two.

The long-simmering antagonism is now finding expression in the debate over land regulation. In 2006 state voters are likely to face an initiative designed to emasculate Washington's 15-year-old Growth Management Act (GMA). The debate pits two of the state's most closely held ideals—property rights and environmental protection—against one another in a struggle for Washington's soul. The parties to the debate, no matter how acrimonious, agree on one thing: Oregon started it.

DON'T LET THE SCREEN DOOR HIT YOU

Oregon was well ahead of its time in 1973 when it passed the nation's first comprehensive land-use planning laws, often referred to as growth management, intended to preserve open spaces and rural land and to confine development to an orderly plan. Oregonians felt they were being stampeded by hordes of Californians and other such "undesirables." Even Oregon Gov. Tom McCall, a conservation-minded Republican who spearheaded growth management there, had the temerity to welcome people to Oregon—just for a visit.

Many years later, in 1990 Washington followed Oregon's lead, adopting a GMA of its own. But by the time the plan had grown teeth in the mid-1990s, opposition to growth management in Oregon was already building. It came to a head in November 2004, when that state's voters overwhelmingly approved Measure 37, an initiative that cripples growth management by forcing the cash-strapped state to pay property owners for lost value blamed on development regulations.

Property-rights conservatives in Washington, most of whom never liked the GMA, took heart from their Oregon brethren's success and began plotting their own assault on growth management. Oregon's Measure 37 gave them a dose of fuel, but it was an obscure-sounding acronym—CAOs (critical-areas ordinances)—that sparked the fire.

STEWARDSHIP OR STEALING?

In late 2004, Pierce and King counties passed land-use regulations known as CAOs, designed to protect ecologically sensitive areas and restrict development in hazardous areas such as floodplains and steep slopes. Among the more controversial features were requirements that parts of certain rural landholdings remain uncleared, preserving the native vegetation.

Rural outcry against CAOs was intense. Property-rights groups howled, and right-wing radio went ballistic. The mainstream local media, already drunk on the divisiveness in the presidential and gubernatorial elections, fanned the flames with headlines about "rural outrage." An attempt to repeal the CAOs failed when a King County Superior Court judge threw out a proposed referendum. (If the state Supreme Court reverses that decision, the referendum could appear on the 2006 ballot, though it would likely be eclipsed by the Measure 37–style initiative.)

Opponents of growth management—among them the Building Industry Association of Washington (BIAW), the Washington State Grange and the Washington State Farm Bureau—began marshaling their forces. Nothing is official yet, but it is something of an open secret that property-rights groups will likely attempt an initiative in the mold of Measure 37 in November 2006. Even our 800-pound gorilla of initiatives, Tim Eyman, lent his support to the nascent plan.

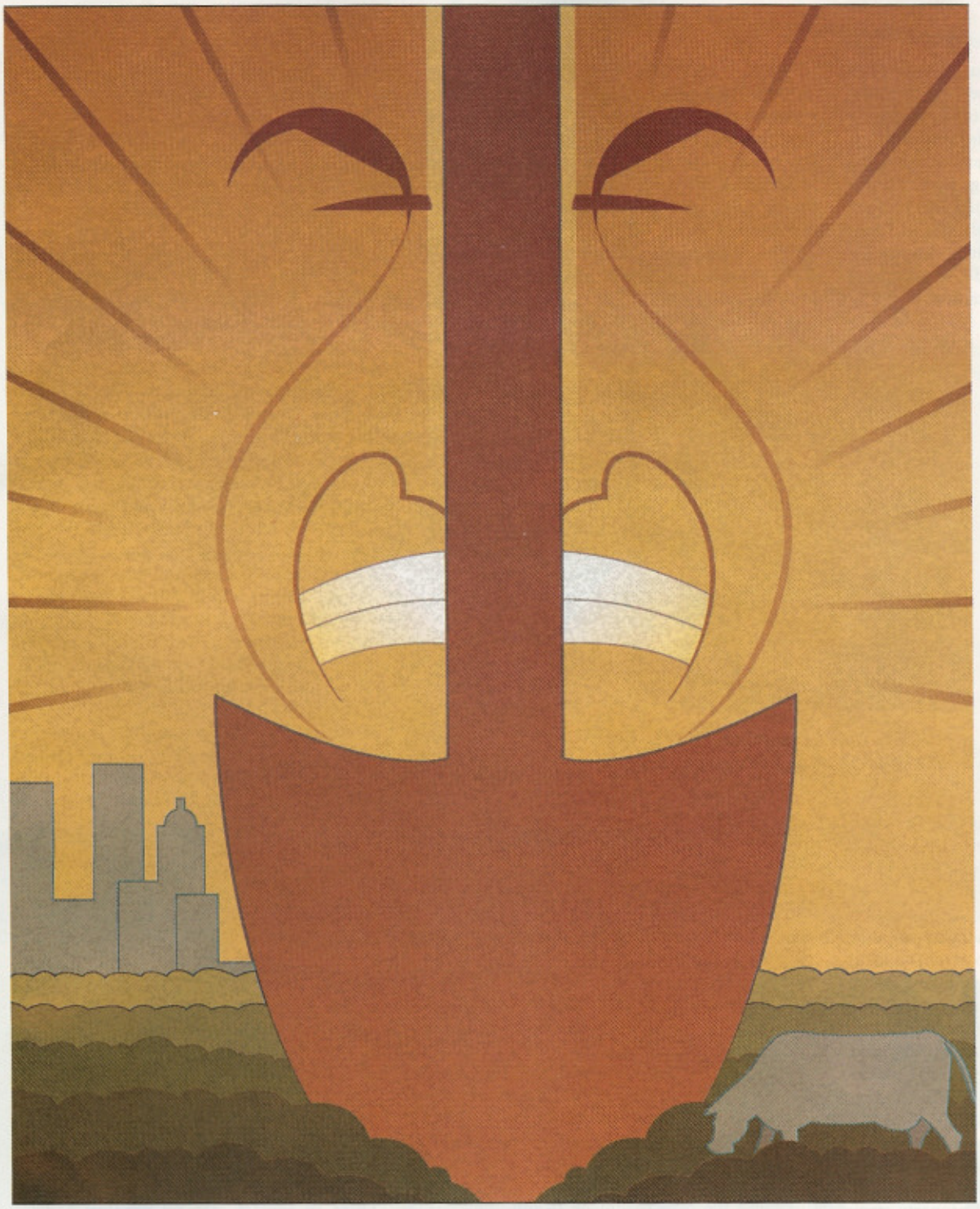
BIAW, a powerful anti-regulation lobby, is widely expected to join the fight against the GMA. Tim Harris, general counsel at BIAW, thinks growth management is a galling form of regulation, "a socialist approach. It's the government telling people where they can live."

At the Grange, communications director Dan Hammock takes a more nuanced view.

"The idea behind growth management is a noble one," Hammock says, "but when you start harming foresters and farmers with that same regulation ..." His voice trails off but picks up again, "... it needs to be looked at."

The Grange, of course, is primarily concerned with agricultural issues. It is especially frustrated by land-use constraints such as streamside buffers and the CAOs, which may reduce farmers' ability to extract full value from their land—land on which Hammock says farmers pay "ridiculously high" taxes.

Property-rights advocates say individual landowners should either be able to get the regulations waived, à la Measure 37, or be compensated for lost land value or income if ordered to provide for the broader public good at their own expense.



Aaron Ostrom, executive director of Futurewise (formerly 1,000 Friends of Washington), disagrees about the extent of property owners' rights.

"Your right to swing your fist stops with my nose," he says.

WON'T YOU BE MY NEIGHBOR?

Ostrom points to a well-established body of law that constrains landowners from actions that harm their neighbors or communities. A property owner cannot flood a neighbor's land, for instance. Widely accepted laws zone for high density or heavy industry; others prevent land uses that are hazardous or obnoxious.

Ostrom, one of growth management's ardent supporters, is lacing up his gloves to defend the GMA. Big membership-based environmental groups such as the Washington Environmental Council, Futurewise, People for Puget Sound, Audubon Washington, and Washington Conservation Voters will join a coalition of labor and business groups in a push to keep the GMA intact.

Although GMA supporters are making preparations for an initiative that does not yet exist, Ostrom says he is not frightened by the specter of such an initiative.

"People are very concerned about [closing] loopholes for developers to exploit," he explains. "The people of Washington have chosen repeatedly to protect people and community and to choose the communities they want."

He points to a Measure 37–style initiative in 1995 that Washingtonians nixed—by a decisive 20 percentage points: the idea of compensating property owners whose land usage was limited by environmental regulations. But GMA opponents think the negative publicity generated by the CAOs has changed public sentiment and made the time ripe for another try.

Ostrom believes the results would be the same.

"Research we've done so far shows that it goes down in flames," he says, referring to the possible 2006 initiative.

Tom Geiger, outreach coordinator for Washington Environmental Council, notes: "The polling that we've seen says that the vast majority of people support growth management and don't feel overburdened by land-use regulations. There can be a publicly vocal minority saying, 'I feel like my property rights are being taken away by government,' but that is not a widely held feeling."

WHEN WHAT'S MINE IS YOURS

The political debate may center on growth management, but the legal question is whether to expand the definition of a "regulatory taking" to prohibit restrictions on property owners' land use without compensation. A "taking"—when a government seizes private property or substantially interferes with it—requires the government to compensate the owner. A regulatory taking, however, is

less clear-cut. Courts have said that regulatory takings occur if government regulations, such as zoning laws, severely reduce the value of a property or drastically impair the owner's enjoyment of it.

Chuck Wolfe, an environmental attorney, has a master's degree in planning from Cornell University and 21 years of experience in land-use law and has chaired both the Planning and Law Division of the American Planners Association and the Environment and Land-Use Section of the Washington State Bar Association.

Aaron Ostrom is betting on Washingtonians to hang onto their growth rules.

Chuck Wolfe thinks a little rule-tweaking could go a long way.

According to Wolfe, in order for courts to find a regulatory taking under current law, "The property needs to be regulated such that, taken as a whole, its value is extremely reduced."

He points to categorical takings—clear examples such as physical invasion of property or reducing a property's value to zero. The idea, he explains, is that there is not a taking every time a property owner's actions are regulated—only when the regulations have gone too far.

" 'Too far' is determined on a case-by-case basis and is often *quite* far," he says. "Just how far is too far?" he asks rhetorically. "We're still trying to figure that out."

Property-rights advocates argue that regulatory takings happen more often than current case law allows. Measure 37 was intended to resolve that question for Oregon property owners by tilting the balance to "not far at all." It is still unclear exactly what Measure 37 will mean for Oregon (see "Measuring Up").

Dan Wood, government relations director at the Washington State Farm Bureau, believes a farmer required to leave a buffer of native streamside vegetation unplowed to preserve stream health should be paid for the lost income from that strip of land.

"Fairness is completely trashed if you don't compensate landowners," Wood says. "Property rights are civil rights."

At the heart of the issue is the notion, often unstated, that people should be allowed to do whatever they want on their own land. With the right phrasing, this sentiment often wins supportive head nods on the vague grounds that America has always stood for independence and liberty—perhaps especially here in the farthest corner of the West.

The Washington Environmental Council's Geiger argues that growth management actually protects liberty.

"Should all of our zoning laws be thrown out?" he asks. "That's the impact of Measure 37. It's about taking away protections from people's property. It requires government to pay property owners for not doing something harmful with their land."

Wood insists growth-management supporters are intentionally overstating their case, and he doesn't mince words.

"Environmentalists in Seattle are not protecting land," Wood says. "They're living in a concrete jungle. They're saying, 'Don't protect private property under any circumstances.' They're environmental supremacists who want to scare people."

GROWING PAINS

No one knows for sure how Washington's voters will respond to the thorny tangle of questions about fairness, balancing private and public good, and planning responsibly for the future. The heat of the rhetoric is sure to rise, but land-use attorney Wolfe wonders whether tweaking the GMA, rather than eviscerating it, could address opponents' main concerns.

Restricting growth management would have immediate consequences for the state, since the GMA affects everything from forestland to traffic congestion. Defenders of growth management believe that, if Washington gets its own Measure 37, cash-strapped governments will be forced to waive land-use laws, resulting in diminished natural resources, less open space, and unmanageable cities.

The problem will only be worsened, they say, if state officials' projections are accurate: By 2030, Washington is forecast to be home to nearly 8.5 million people—equivalent to adding roughly the population of the city of Chicago to the state's population as of 2000. If the growing population is unfettered by growth management, many wonder, will the Evergreen state be left with any green? **L&P**

—Eric de Place is a freelance writer and a senior research associate at Northwest Environment Watch, a Seattle-based research and communications center.

MEASURING UP

Oregon's Initiative 37 could spell doom to anti-sprawl efforts

By Eric de Place

So far, the main effect of Oregon's anti–growth-management Measure 37 has been legislative gridlock. Lawmakers in Salem have wrestled endlessly and unsuccessfully with attempts to clarify, and in some cases alter, Measure 37. But the Legislature is not the only roadblock to full implementation of the initiative, which was passed in November 2004.

Bob Stacey, executive director of 1,000 Friends of Oregon, believes Measure 37 violates Oregon's state constitution. He plans a court challenge this year. Property owners have already brought a number of Measure 37 claims, but Oregonians are still waiting to see the results. Many claims are likely to be fairly innocuous, but several have generated substantial controversy.

In one well-publicized case, Polk County commissioners approved a farmer's request to develop a million-square-foot shopping mall on a farm in the Coast Range, a move that would not have been allowed prior to Measure 37. The result could be large-scale sprawl and building in an area that is today mainly forests and small farms. In another case, a Clackamas County farmer won county approval to operate a mine on his land, despite petitions against it from 43 neighbors, many of whom fear it would create a potential for landslides and erosion, as well as disturb their animals. The farmer still needs state approval and a mining permit.

Only time will tell whether Oregon voters opened a Pandora's box when they approved Measure 37. In the meantime, Stacey has some advice for Washingtonians.

"Look south and see what's happening [in Oregon] before you vote," he says.