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City Club of Portland Report: Measure 7 and Compensation for the Impacts of Government Regulation

City Club of Portland (Portland, Or.)

The City Club of Portland Report

MEASURE 7

AND COMPENSATION FOR THE IMPACTS OF GOVERNMENT REGULATION

CITY CLUB OF PORTLAND

The City Club membership will vote on this report on Friday, April 5, 2002. Until the membership vote, the City Club of Portland does not have an official position on this report. The outcome of this vote will be reported in the City Club *Bulletin* dated April 19.

The City Club of Portland Mission
To inform its members and the community in public matters and to arouse in them a realization of the obligations of citizenship.

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EXECUTIVE SUMMARY

In November 2000, Oregon voters shocked the land use community, both locally and nationally, by approving Ballot Measure 7, which represents a relatively new and extremely controversial principle requiring compensation for so-called "regulatory takings."

The term "takings"[1] derives from the Fifth Amendment to the U.S. Constitution, which prohibits the government from taking private property for public use without just compensation. Early in the 20th Century, as local governments began adopting zoning laws and other laws that placed limitations on land use, the Supreme Court attempted to address just how much of the landowner's rights had to be infringed before a "takings" was considered to have occurred and a right to compensation triggered. The court set forth some general guidelines, which generally resulted in a subjective, case-by-case analysis, but almost always focused on whether the landowner had any remaining viable economic use of the property after the regulation was applied.

From the 1930s to the early 1970s, the takings clause received little attention in the courts, at least at the national level. This same period saw a marked increase in the amount of governmental regulation—from Roosevelt's New Deal to environmental regulations to historic preservation ordinances. Much of this new body of regulations restricted how landowners could use their land. Beginning in the mid-1970s, nearly every Supreme Court term has seen at least one high profile case involving claims for "just compensation" due to a restriction on the use of real property.

Early in this period of increased interest in the takings clause—in the mid-1980s—a University of Chicago law professor, Richard Epstein, developed the concept of a "regulatory" taking. This theory responded to the frustration of many property owners with the threshold of loss that had to be shown to establish the right to just compensation under traditional takings law. Epstein argued that the right to compensation should hinge on how much value the government "takes"—not on how much value is left to the landowner.

Epstein's theories found a receptive audience in the administration of President Ronald Reagan and resonated with property rights advocates around the country. In fact, regulatory takings legislation was included in the Republican Party's "Contract with America" in the 1994 mid-term elections. And, the regulatory takings concept is at the heart of Oregon's Ballot Measure 7.

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[1] For the reader's convenience, a glossary of terms is included as ***Appendix A.***

Measure 7 was marketed to voters as a question of basic fairness: when the government takes action that reduces the value of property, it should pay for the reduction. Advertisements focused on a few individuals who purchased land in established residential areas and then were unable to build a residence on the land following adoption of new regulations. Your committee interviewed a number of landowners and confirmed that there have been cases of hardships imposed by new regulations. A majority of the committee felt that some form of relief is appropriate for these hardship cases.

However, in many cases of apparent hardship, there are extenuating circumstances that were not widely discussed publicly prior to the election and that are not given any weight in Measure 7's compensation provisions. Instead, Measure 7 adopts a simplistic approach to a complex problem. In addition, Measure 7 would apparently have consequences not intended by its drafters, including extending a right to compensation to property owners who purchase land after a regulation is adopted but before the regulation is formally applied to their specific parcel. We point out some of these defects in Measure 7 and identify a number of elements that should be considered in developing a compensation system for regulatory takings.

For reasons detailed in the body of the report, your committee concluded that, although the Oregon land-use system is not perfect, Measure 7 is not the proper vehicle for remedying hardships. Your committee believes that some action should be taken to alleviate long-standing frustrations stemming from Oregon's land use system and to provide relief to those property owners who have clearly suffered unfair hardship. Although implementation of Measure 7 has been stayed pending Oregon Supreme Court review, the issues it raises are likely to continue being controversial and the subject of future public debate. Accordingly, we set forth a list of principles intended to strike a balance between individual property rights and the interests of the community. We believe these principles should guide any effort to replace Measure 7.

PRINCIPLES FOR "SON OF 7" SOLUTIONS

In the course of our work, we learned that the issues surrounding compensation for governmental restrictions on the use of property are extremely complex. We developed a set of principles that we believe should guide any debate over compensation for land use regulations and any legislative or initiative response to Measure 7. The principles include the following:

1. Real property is a finite resource that is subject to increasing pressures due to population growth. Society has a strong interest in protecting and regulating the use of this resource.

2. Although Oregon's current land-use system may not be perfect, it is a legitimate and successful tool for accomplishing many goals that are in the public's interest.

3. The current constitutional and statutory framework of land use planning in some cases puts unfair burdens on certain landowners, and those burdens should be compensated. Government regulations can cause a loss in the value of private property that, in some cases, should be compensated.

4. The definition of a "taking" needs to be refined to set definite parameters on the scope of compensable takings caused by land use regulations.

5. Compensation should not be paid for alleged reductions in value resulting from regulations abating nuisances. The definition of a "nuisance" needs to be clarified and updated periodically to reflect evolving scientific knowledge, the cumulative impact of individual land-use decisions, and community values.

6. Any compensation system should be codified in statutes rather than the Oregon Constitution and should emphasize certainty and stability.

7. If the government is required to pay compensation to a property owner, the government should acquire an enforceable property-related right. The government's right should be transferable. Subsequent property owners should take ownership of the land subject to the government's acquired right to restrict use of the property without further compensation.

8. The government should have options in terms of the form of compensation (such as tax abatements and property swaps, among others). These should include the option to sell back the right to engage in the restricted use at a later date.

9. Only losses of value above a certain threshold should be eligible for compensation.

10. The government should not guarantee unreasonable expectations of profit. Expectations are more likely to be reasonable if they involve continuation of a historic use or a use that was expressly permitted (e.g., under zoning laws) at the time the owner acquired the property. Speculation (e.g., of the assumed right to build a subdivision on farmland) should not be compensated.

11. The compensation scheme should set a date that establishes the baseline of regulations or restrictions that will not be compensable.

12. There should be a statute of limitations on submitting claims.

13. If an alternative to Measure 7 is presented to voters, it should include not only the compensation scheme, but also the corresponding funding mechanism.

14. Compensation for losses by regulatory takings should be funded, to the extent practicable, by revenue generated from property owners who benefit from changes in land-use regulation. This inverse corollary to takings compensation should be assessed upon the property owners' realization of profits.

15. In reviewing specific proposed land use regulations, regulators should be required to take into account the burden on private landowners (such as in a fiscal impact statement) versus the benefits to the public from the regulations and the amount of likely regulatory takings claims that will result.

Making land-use planning work for positive purposes while mitigating negative side effects is a very challenging and critically important undertaking. Oregon has wrestled with this dilemma since the state's land-use system was created in 1973. Regardless of how the Oregon Supreme Court rules on Measure 7, the issue is not going away. Your committee thinks the time is right to take a comprehensive look at the issue of compensation for regulatory takings. Any relief should be narrowly tailored to cases of truly unfair hardships, taking into account the principles we have set forth above.

RECOMMENDATIONS

1. **Adopt Principles:** The City Club should formally adopt each of the fifteen principles. The Club should use these principles to evaluate any future proposals for a system of compensation for the impact of government regulations on property values.

2. **Identify Appropriate Balance:** The governor and Oregon Legislative Assembly should immediately begin a public process that will identify the appropriate balance between property rights and community interests that is acceptable to, and will be supported by, the majority of Oregonians.

3. **Develop and Implement Limited Compensation Program:** The governor and Oregon Legislative Assembly should use the input from the public process and work with interested and affected parties to craft and implement a statutory compensation program that follows the principles that we have laid out.

4. **Eliminate Measure 7 language from the Oregon Constitution:** If the Oregon Supreme Court upholds Measure 7, the Oregon Legislative Assembly should refer to voters a measure to remove Measure 7 from the Oregon Constitution.

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I. INTRODUCTION

In November 2000, Oregon voters approved Ballot Measure 7, which amended the Oregon Constitution to require state and local governments to compensate property owners when regulations reduce the value of real property. Measure 7 is generally viewed as the most sweeping compensation provision for regulatory reductions in property value in the entire United States. Many commentators viewed passage of Measure 7 with shock and alarm, both because Oregon has been cited as a national model of prudent land use policies and because they believe that Measure 7 could spell the end of the current system of land use planning in Oregon.

Because of the projected impact of Measure 7 on Oregon's land use system and the corresponding impact on individual citizens both in Portland and in all of Oregon, the City Club of Portland authorized a short-term committee to study the background, impetus, likely impact, and future prospects of Measure 7.

A. The Study Charge

The City Club asked us to prepare a report that would:

- help readers understand the traditional basis for—and limitations on—government land use regulations in the U.S. Constitution. It should discuss the expanded interpretation of property "taking" advocated by the property rights proponents in recent years and the arguments for and against this interpretation. The study should help readers understand the likely impacts of a formal recognition of "regulatory takings" on the current balance between private property interests and government activities and programs.
- review how other states have attempted to increase government sensitivity to the impacts of regulations on private property, or how they have required compensation for reductions in property values caused by government regulations.
- explore what Oregonians think is the problem that needs to be fixed by Measure 7.
- provide an overview of the major elements of Measure 7, and briefly summarize the problems and issues people have identified with the current language of the measure.
- identify and discuss some alternatives to Measure 7, such as: minor language revisions; more substantial changes (such as a statute of limitations, or minimum thresholds for when compensation would be required); or other changes to Oregon's land use system.

- recommend how Oregonians and public and private sector decision-makers and organizations should respond to Measure 7.

The City Club also encouraged us to take advantage of efforts underway at the time (led by Governor Kitzhaber, the Oregon Attorney General, the City of Portland, the Oregon League of Cities, and others) to understand the impacts of Measure 7 and to evaluate different possible responses.

The committee began its work in January 2001. From January through April, the committee met twice a week, interviewing landowners, lawyers, leaders of advocacy groups, planners, and appraisers, to learn about the Constitutional standards for compensation, the Oregon land use system, and how Measure 7 would likely change the existing compensation rules. A list of witnesses is attached as ***Appendix B***. A list of resource materials is attached as ***Appendix C***. From April through November, the Committee met weekly to discuss and debate the issues raised by Measure 7 and to prepare this report.

B. Description of Report Structure

The report begins with a general discussion of the philosophy of property ownership and the basis of the public's right to regulate use of property. We then discuss the traditional interpretation of the takings clause in the U.S. Constitution and how that interpretation has evolved over time. Next, we introduce the concept of regulatory takings, through a discussion of the views of Professor Richard Epstein, and explain how adherents to Epstein's philosophy have attempted to implement this philosophy at the national level.

We then turn to Oregon, first giving a brief overview of the Oregon land use system and then addressing Measure 7, the embodiment of the regulatory takings theory in Oregon. We point out some of the interpretive problems of Measure 7 and finally propose some principles that we believe should be considered in crafting a replacement to Measure 7.

C. Brief General Description of M7

Ballot Title: "Amends Constitution: Requires payment to landowner if government regulation reduces property value."

Major elements:

- If a regulation restricts use of private property and has the effect of reducing property value, the landowner is entitled to just compensation, including attorney fees and costs if compensation not paid within 90 days after filing of claim.
- Historically recognized nuisance laws are not considered to reduce property value.
- Regulations implementing federal mandates or prohibiting use of property for certain activities (e.g., pornography or gambling) do not trigger a right to compensation.
- Compensation is due if a regulation was adopted, first enforced or first applied after the landowner acquired the property and the regulation continues to apply 90 days after the landowner applies for compensation.
- "Regulation" includes any enforceable enactment of government, and reduction in value includes the cost of complying with environmental regulations.

Measure 7 was presented to the voters as a question of basic fairness. Advertisements focused on individual landowners who purchased property in established residential areas and were unable to build due to regulations adopted after the landowner purchased the property. During the campaign, there was little public discussion of the ambiguities or broad implications of Measure 7. The measure passed 53 percent to 47 percent.

(See ***Appendix F*** for the full text of Measure 7.)

II. BACKGROUND

A. Philosophical Underpinnings—Balancing Property Rights and Community Needs

When the community's needs impinge on private property rights, it becomes apparent that we—in the United States and in Oregon—lack consensus on the appropriate balance between these potentially opposing ends. Defining the appropriate balance is at the heart of the Measure 7 debate.

How one views Measure 7, and land use laws generally, depends in large degree on one's view of property ownership. Although each person has a general notion of what it means to own property in the United States in 2001, in fact a wide spectrum of property ownership systems is possible.

At one end of the spectrum would be a system of communal ownership, where decisions about possession and use of the land are made based on community consensus. In this system, the occupier of property has few individual rights, and likely would not even have the right to exclude other community members from the occupied property. This type of system is commonly associated with the indigenous peoples of North America.

At the other end of the spectrum would be a system where individuals have the inalienable, absolute, and unrestricted right to possess and use property over which they claim ownership. The community has no right to restrict the uses to which others put their property, even if the community is willing to compensate the property owner for the restriction. This system is suited to undeveloped, sparsely populated lands, where the impacts of particular uses are widely dispersed and where other property owners are not close enough to feel the effects of any impacts. This system is associated with the "wild, wild west" in the days of 19th Century western expansion.

Most Oregonians, indeed most Americans, will find their philosophy somewhere between the two ends of this spectrum. Most Americans would agree that communal ownership of all property is not practical or desirable. Indeed, most would say that the private ownership of property has contributed to the economic development and general prosperity of the United States and gives individuals incentives to preserve the value of their property.

At the same time, there is a broad consensus that the community has the right to restrict the uses of property, e.g., to prevent harm to a neighboring landowner or his land. Collectively, U.S. and state constitutions, common law, statutes and ordinances, and social mores comprise an "evolving social consensus" or a "social contract" that simultaneously provides for private property while granting the government the authority to regulate the use of private property. This framework is not rigidly codified and unambiguous. Rather, its flexibility derives from the fact that it is open to interpretation.

B. National Context

1. U.S. Constitution

The U.S. Constitution is the appropriate starting point for consideration of this topic because, although individuals may disagree over its interpretation, it is the accepted governing authority and philosophical foundation for private property rights in this country. The Constitution, as a statement of broad philosophical principles rather than a legal code, leaves room for interpretation according to the reader's values. Federal courts serve as the official arbiters of the U.S. Constitution.

The relevant provision of the Constitution is the Fifth Amendment's Takings Clause, which states simply that private property shall not be taken for public use without just compensation. On the one hand, the Takings Clause establishes government's right to take private property under certain circumstances (the power of "eminent domain"). On the other hand, it also establishes that government has the obligation to compensate property owners when it takes property. The Constitution does not, however, define the broad terms "private property," "public use," "just," and "compensation."

It is generally understood that the "Takings Clause" was designed to protect individuals against the physical appropriation of private property by the government without compensation.[2] The Framers of the Constitution limited the Takings Clause to physical appropriation because they could not have anticipated the broad range of regulations and restrictions applied to property in modern America.[3]

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[2] In reviewing the history of the Takings Clause, U.S. Supreme Court Justice Blackmun noted, "James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government." *Lucas v. S. Carolina Coastal Counci*l, 505 U.S. 1003, 1057, n.23 (1992) (Blackmun, J., dissenting).

[3] See, e.g., R. Epstein, Takings: Private Property and the Power of Eminent Domain 28-29 (Harvard Univ. Press 1985).

By the late 1800s, it was recognized that the government could take property not only through physical possession of the property but also by destroying its value entirely. For example, in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall) 166, 181 (1871), a state government authorized construction of a dam that flooded an upstream property. The U.S. Supreme Court determined that the property owner was entitled to compensation because the real property was "actually invaded" (by water) just as if the government had occupied the property.

2. Growth In Government Regulation and Development of the Court Definition of Takings

The United States changed dramatically from the time the Constitution was written in the late 18th Century to the early 20th Century. The country's size more than tripled, the population grew exponentially, new transportation modes enabled people to migrate and settle the "open" territory, and the economy began to shift from agrarian towards an industrial base. State and local governments attempted to deal with the changes associated with this growth and complexity by adopting more regulations over land use and other activities. These regulations caused friction between the rights of the individual and the needs of the community. This friction was perhaps all the more acute because many people had immigrated to America precisely to find greater individual freedom and open space.

In the early 20th century, the U.S. Supreme Court struggled with determining when state-imposed restrictions protected the public health and safety versus when a regulation served broader governmental goals. When the restriction was viewed as protecting public health, safety, or welfare, a taking was held not to occur. The principles underlying these holdings were:

a) No property owner has the inherent right to inflict injury upon the community, see, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition on brickyards not a taking); or

b) The legislature has broad latitude to decide what restrictions are in the community's best interests, see, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning regulation preventing owner from using property for industrial purposes in residential zone was not a taking, despite 75 percent reduction in value).

If the court viewed the regulation as serving governmental goals other than public health, safety, or welfare, a taking was held to occur on the

theory that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (law requiring coal mine operators to leave enough coal in the ground to support surface structures was a taking).

Beginning as early as the 1950s, indisputable evidence of severe air and water pollution introduced the concept of environmental protection into the American consciousness. People organized efforts to clean up the environment, and to pressure Congress to pass laws regulating pollution. Although not necessarily styled as land use laws, the effect of federal legislation was to restrict the permissible uses of property.

In addition to the environmental movement, the 1970s saw the rise of the historic preservation movement in response to a rapid depletion of the nation's stock of historically significant buildings. Many historic preservation ordinances prohibited property owners from making changes to structures of historic significance. In fact, a case involving the mandated preservation of the Grand Central Terminal in New York City was the first significant Takings Clause case to reach the U.S. Supreme Court since the 1920s.

In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Court held that applying New York City's historic preservation ordinance to block the construction of a 40-story office tower atop Grand Central Station was not a "taking." The court set out a comprehensive, yet vague, list of "influential factors" for fixing the line between compensable and noncompensable regulation. These factors were (1) the economic impact of the government action; (2) the extent to which the government action interfered with reasonable investment-backed expectations; and (3) the "character" of the government action. In a narrow majority, the Court also held that the Takings Clause applies only to the impact of restrictions on a property as a whole, and not on components of the property (e.g., subsurface mining or vertical development of airspace).

The court recognized that, notwithstanding the test it articulated, determining whether a government regulation is a taking cannot be based on mechanical application of fixed principles. Rather, it is a determination based on "fairness and justice," combining close scrutiny of the facts with ad hoc, case-by-case analysis. Because of the injection of subjective notions of "fairness," this test did not cure the unpredictability of the law.

3. National Property Rights Movement

With the election of Ronald Reagan as president in 1980, a backlash began against the increased regulations that marked the 1960s and

1970s. Included in this backlash was a movement that some commentators have referred to as a national property rights movement. Today, the movement has grown to include a network of local, state, and national property rights groups across the country. The movement seeks to protect and expand the right of property owners to use their property and to limit government regulation of private property.

The property rights movement gained momentum in 1985, when an influential legal scholar, Professor Richard Epstein, published a book, *Takings: Private Property and the Power of Eminent Domain*, which criticized the U.S. Supreme Court's approach to takings cases for most of the 20th Century and advocated expanding the takings concept to include "partial takings" and "regulatory takings." Shortly after the publication of Epstein's book, property rights advocates began advancing many of Epstein's views.

Adherents to the "property rights" movement have adopted a two-pronged strategy to advance their views on the proper balance between individual property rights and governmental regulations. The first prong focuses on an effort to influence judicial decisions to expand the scope of government regulations that are held to be compensable "takings" under the U.S. Constitution. The second prong focuses on urging legislatures to pass laws limiting regulation, either by requiring compensation for regulation-induced decreases in property values, or by inserting procedural obstacles to the adoption of regulations, or a combination of the two.

A key goal of the property rights movement is to substantially raise the cost to government of implementing restrictions on the use of private property. Property rights advocates hope that these increased costs will lead governmental agencies to rescind or waive existing regulations and/or significantly reduce the adoption of new regulations.

Epstein's Theory of Regulatory Takings: Because the judicial and legislative strategies have both drawn from Epstein's writings, any consideration of property rights has to consider his influence. His philosophy has shaped much of the thinking and law in this area for the past 15 years, and permeates the thinking of Measure 7 proponents.

Epstein says his 1985 book is about:

"…the conflict between the original constitutional design and the expansion of state power. At a general level it argues that the system of limited government and private property is not elastic enough to

accommodate the massive reforms of the New Deal or those reforms that preceded or followed it." He argues that "the eminent domain clause and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments, progressive taxation. Where these governmental innovations do survive in principle, it is often in a truncated and limited form." (*Takings*, Preface, p. x.)

Epstein argues that the majority of government limitations or intervention in the use of private property is inappropriate in most cases, unless government compensates the property owner for the impact of the government action.

Epstein contended that the U.S. Supreme Court's takings cases focused too much on what use was left to the property owner and not enough on the value of what had been taken. Sometimes characterized as a "partial takings analysis," this view states that compensation may be due even if the property owner is able to continue to use his property in the same way he always had, but is prevented by government action from putting the property to a different use.

A second dominant theme in Epstein's work is skepticism over the breadth of the government's "police power," i.e., the power to restrict private conduct to protect public health and safety. To Epstein, the fundamental question is whether the regulation is an attempt to control the harmful effects of a property owner's actions on other people or property or whether the regulation attempts to confer a benefit on the general public. In either case, the regulation is permissible (because it is done for a public end), but in the second situation, Epstein contends the taking must be compensated. Stated another way, when the government regulates to abate a nuisance, no compensation is due. When it regulates to curtail a use that is not a nuisance but achieves some other public benefit (e.g., to preserve a view), compensation is due. Epstein advocated a definition of "nuisance" based on a narrow set of uses historically recognized under common law—generally, involving some type of physical invasion of a neighboring property.

A final theme in Epstein's work is advocacy of heightened scrutiny of the stated justifications for governmental actions. He would not defer to legislative judgments about the public welfare and safety.

Many of Epstein's themes dovetailed with the philosophy of President Reagan, who was beginning his second term as Epstein's book was published. President Reagan, and his successor, President Bush,

shaped the takings debate in significant ways.[4] In 1982, legislation restructured the U.S. Court of Claims (now known as the Court of Federal Claims) and established the Federal Circuit Court of Appeals, both of which were vested with exclusive jurisdiction to hear takings claims in excess of $10,000 against the U.S. government. President Reagan appointed every judge to the Court of Federal Claims. Presidents Reagan and Bush combined appointed a majority of the judges on the Federal Circuit Court of Appeals.

Judicial Prong: The influence of Epstein and the Reagan and Bush appointees is seen in three recent U.S. Supreme Court decisions: *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Palazzolo v. Rhode Island*, No. 99-2047 (June 28, 2001). *Lucas* involved a ban on new home construction on barrier islands in South Carolina, because the state concluded that the construction was causing erosion of the islands. The ban prevented Lucas from building houses on two building lots that he had purchased for $795,000 and effectively prohibited any economic use of the property. The court held that a regulation that deprives a landowner of all economic use constitutes a "taking," unless the state's property and nuisance laws restricted the use of the property when it was purchased. For example, the owner of a lakebed who is prevented from filling the lake if this would cause flooding on other people's property would not be entitled to compensation. Likewise, the owner of a nuclear power plant who is told to dismantle the plant because it sits on an earthquake-prone fault line would not be entitled to compensation. In these situations, the state does not owe compensation because its proscription does not prohibit a use that would previously have been permissible. According to the court, the fact that a particular use has been engaged in for a long time by other similarly situated landowners—and there were many existing homes near the property purchased by Lucas—argues against a finding that the use is a nuisance.

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[4] In his memoir, Reagan Administration Solicitor General Charles Fried offers the following analysis of Reagan's Executive Order 12630 (March 15, 1988), which generally required federal agencies to follow Epstein's philosophy in adopting regulations:

"Attorney General [Edwin] Meese and his young advisors—many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right—limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation."

In *Dolan*, an Oregon case, the property owner applied for a permit to expand a retail store and parking lot and to build an adjacent small shopping center. The city granted the permit with the conditions that the owner dedicate to the city (a) the portion of the property within a 100-year floodplain, and (b) an additional 15-foot wide strip of land to be used for a bike and pedestrian path. In holding that the property owner was entitled to compensation, the majority, comprised entirely of Reagan and Bush appointees, held that higher scrutiny is necessary where a government decision relates to a single parcel (as opposed to general zoning rules) or requires an outright dedication of land to public use. The Court held that there must be an "essential nexus" between the articulated governmental interest and the conditions for regulatory approval, and there should be a rough proportionality between the conditions for regulatory approval and the impact of the proposed development.

In *Palazzolo*, a Rhode Island case, an individual purchased property, most of which was salt marsh subject to tidal flooding. Government agencies rejected the owner's applications to fill and develop the property based on state regulations that protected the salt marshes from development. The regulations were in effect when the individual became the legal owner of the property. A 5-4 majority of the U.S. Supreme Court justices ruled that landowners are not barred from bringing takings claims merely because a particular regulation was in effect prior to the time the landowner obtained title to the property.

Legislative Prong: Although the popular press did not emphasize them, the 1994 Republican-sponsored Contract with America included compensation provisions for regulatory actions that reduced the fair market value of the regulated "portion" of the property by 20 percent or more. These provisions, which bear striking resemblance to many features of Measure 7, were included in the Job Creation and Wage Enhancement Act of 1995. This act, which is set forth in ***Appendix H***, passed the House of Representatives but died in the Senate.

Property rights advocates have had more success at the state level. During the 1990s, all the states considered property rights laws, and about half the states adopted some form of law. Measure 7, if implemented, would provide property rights protections than far exceed those provided by similar laws currently effect in other states.

4. Characteristics of Different Types of State Laws

State "property rights" laws generally fall into four categories:

1. Attorney General review of proposed regulation.

2. State and local agency assessment of proposed regulations.

3. Compensation to land owner for regulatory takings.

4. Dispute resolution.

Category 1—Attorney General Review: These statutes do not alter the definition of a taking in either the federal or state constitutions. Rather, the intent of the legislation is to avoid adoption of regulations that, under existing takings law, would likely lead to takings claims. It is difficult to determine the impact of these laws because advice provided to state agencies may be protected by attorney client privilege, which makes it difficult to determine if the attorney general found a proposed regulation subject to takings provisions or whether agencies have in fact revised proposed regulations. Moreover, attorneys general have noted that it is often difficult to determine whether a proposed regulation would constitute a takings until it is applied to a specific piece of property.

Category 2—State Agency and Local Government Assessment: This type of legislation typically requires the attorney general to prepare guidelines to assist state agencies and local governments to conduct an impact analysis to determine likely takings implications of proposed regulations. Some statutes in this category require government agencies to prepare a written evaluation of regulations that specifically weighs the burden on private landowners against the benefits to the public from the regulation and to consider less burdensome alternatives. Many are informal and undocumented, making it nearly impossible to determine what conclusions were reached by agencies.

Category 3—Compensation for Regulatory Takings: Measure 7 would fall into this category. Typically, there is a minimum threshold in property value reduction before a landowner will have standing to assert a claim (e.g., 25 percent reduction in value). In Florida, the threshold test is whether the regulation imposes an "inordinate burden" on the property owner. We focus more on Florida below, because it is the state with the closest analogue to Measure 7.

Category 4—Conflict Resolution: This is the newest approach to land use. As the name implies, it is based upon negotiation, mediation and arbitration in contrast to traditional litigation. The theory is that conflict resolution would be employed to settle disputes stemming from failure to satisfy either agency assessment or compensation proposals. Due to the nature of alternative dispute resolution (i.e., consensual outcomes that may or may not be public record), it is virtually impossible to determine the impact of these laws.

Two States have Overturned Property Rights Laws: During the 1990s, at least two state legislatures passed property protection laws that were subsequently overturned by voters.

In 1992, the Arizona legislature passed a law that required the state Attorney General to analyze every new proposed regulation to determine whether it "affected" the value of a private property owner's

States that enacted Property Rights Laws 1991-1996

State	Takings Assessment	Compen-sation	Conflict Resolution
Arizona	•		
Colorado			
Delaware	•		
Florida		•	•
Idaho	•		
Indiana	•		
Kansas	•		
Louisiana	•	•	
Maine			•
Michigan	•		
Mississippi		•	
Missouri	•		
Montana	•		
Nebraska	•		
North Carolina		•	
North Dakota	•		
Tennessee	•		
Texas	•	•	
Utah	•		
Washington	•	•	
West Virginia	•		
Wyoming	•		

Source: Jacobs, *State Property Rights Laws*, p.11.

real property and, if it did, the agency proposing the regulation had to estimate the cost of compensating property owners. This requirement effectively froze new regulations due to the administrative burden of estimating the costs. Arizona voters repealed this law by a margin of 60 percent to 40 percent in a November 1994 referendum.

In July 1995, the Washington legislature passed a law similar to Measure 7 requiring compensation to landowners for any diminution in value caused by governmental regulation. Before this law could take effect, a citizen initiative referred the law to voters, who repealed the law in November 1995 by a margin of 60 percent to 40 percent.

Florida—The Most Advanced Property Compensation Law in Effect: Florida passed two separate laws in 1995 and is one of the only states to have a functioning compensation system analogous to the system contemplated by Measure 7. The experience in Florida provides some insights as to what might happen in Oregon if Measure 7 is upheld and becomes law. A detailed summary of the Florida laws is set forth in ***Appendix D***.

One law, the Florida compensation statute, creates a cause of action for landowners who believe that a government regulation enacted after May 11, 1995, has placed an "inordinate burden" on their property, without actually resulting in a taking under the Florida or U.S. Constitutions. It defines an "inordinate burden" as an action that either denies a property owner his or her reasonable, investment-backed expectations or vested rights, or that forces the property owner to bear a disproportionate cost for the public good.

The other law, the Dispute Resolution Act, establishes a mediation process for property rights disputes. Although more than 100 claims had been initiated under both acts (compensation and dispute resolution) through July 2001, the Florida Attorney General's office indicates that a court has not ordered any claims to be paid under either act. However governments have settled a number of the claims out of court. The details of the settlements have not been disclosed. However, the sample of claims in the table below may give the reader a sense of the nature and dollar amount of the claims filed under the compensation act.

It is too soon to tell what the ultimate impact of these laws will be. To date, Florida has not been ordered to pay compensation for claims. However, Florida's law does not provide compensation for regulations enacted prior to the effective date of the compensation statute, limiting the number of property owners who would have immediate

Nature of Claim	Dollar amount claimed
Proposed industrial plant within 300 feet of residential property subjected to conditional use permit	$4,140,000
Elimination of design bonuses, which reduced maximum allowable floor area ratio for property	$1,040,000
Beachfront protection ordinance reduced developable portion of property	$710,000
Inclusion of property in designated historical district	Unknown (alternate relief of exclusion from historical district requested)
Ordinance (approved in referendum) limiting building heights to five stories	Unknown
County resolution prohibited owner from removing fill from property	$2,931,896
Adoption of ordinance prevented owner from building two new communication towers on property	Unknown

claims. In this regard, it is interesting to note a five-fold increase in compensation claims in Florida between 1996 and 1999.It is also interesting to note the broad array of regulations that have triggered claims for compensation, including general zoning laws that rarely give rise to takings claims under existing constitutional standards.

Critics warn that the Florida laws will have a "chilling effect" on government regulation. They warn that governments will be reluctant to adopt new regulations needed to serve the public good because of the cost of compensating property owners. It is unclear the extent to which governments in Florida are choosing not to adopt new regulations because of compensation requirements.

5. Current State of National Law

On the judicial level, it is fair to say that the constitutional law of "takings" continues to be complex and outcomes can be unpredictable. Since the 1980s, there has been a decided shift towards greater scrutiny and skepticism of governmental restrictions on development. Courts have required clearer articulation of the public interest in restricting property use, and demanded a better demonstration of how the restriction will achieve the articulated public interest. To avoid compensation where a restriction eliminates

all economic use of property, the government must show that the proposed uses could have been prohibited under common law nuisance principles. Finally, the U.S. Supreme Court has embraced the notion of considering the many aspects of property ownership separately and requiring compensation where there is a taking of any portion of the property rights.

On the legislative level, the movement to increase the circumstances when property owners are entitled to compensation due to regulations seems to have lost steam. Both property rights and land use advocates are watching Florida carefully to see the impact of their laws.

C. Oregon Context

1. Oregon Constitution vs. U.S. Constitution

Even before Measure 7, the Oregon Constitution had a "takings clause." Specifically, Section 18 of Article I, provides,

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."

It appears that the Oregon Constitution, at least under current judicial interpretations, is less likely than the U.S. Constitution to support a finding that a particular restriction constitutes a taking. In a 1998 case (*Dodd v. Hood River County*), the federal Ninth Circuit Court of Appeals considered the differences between the U.S. and Oregon Constitutions. The court indicated that, under the Oregon Constitution, there would not be a taking if the court determines that there is still some "substantial beneficial use" of the property. Under the U.S. Constitution, however, there could still be a taking if the economic impact of the regulation excessively interfered with distinct investment-backed expectations.

2. The Oregon Land Use System

History: The Oregon legislature first authorized land use regulation by incorporated cities in 1919. After an initial challenge, the Oregon

Supreme Court upheld this authority in 1925. In 1947, the legislature extended zoning authority to counties. In 1969, the legislature passed Senate Bill (SB) 10, which required every city and county within the state to adopt a comprehensive plan and enact zoning regulations. The voters upheld this legislation in a legislative referral in 1970. However, the bill had significant shortcomings, including lack of an enforcement mechanism to require local governments to act, and many local governments simply ignored the legislation. In 1973, the Legislature passed SB 100 creating a statewide land use planning system.

Structure and Operation: Although the details of this system have changed since SB 100 was passed, the Oregon system basically provides for a state agency charged with setting statewide planning goals and assuring compliance with those goals at the local level through comprehensive plans and implementing ordinances. The statewide agency charged with adopting the goals and reviewing local ordinances is the Land Conservation and Development Commission (LCDC). The Land Use Board of Appeals (LUBA) is the adjudicatory authority created to review land use decisions challenged as being inconsistent with the statewide goals. Many have hailed this statewide land use system as a national model.

LCDC establishes state planning policy through the adoption or amendment of goals (planning standards) that apply to state agencies, local governments, and special districts. The goals are set forth in ***Appendix E***. LCDC must make a finding of need before adopting or amending a goal, and the goals must have a "reasonable degree of flexibility" in how they are implemented. In addition, LCDC must assess the effects of goals on the economy and property interests and must consider alternative actions that might be used with lesser economic effect. There is a detailed process for adopting or amending goals, including extensive public hearings throughout the state. Generally, a new or amended goal cannot take effect for at least one year after adoption.

Local governments and special districts must adopt comprehensive plans that conform to the statewide goals. Each county is responsible for coordinating all planning activities affecting land use within the county. Metro is the designated planning coordinator for the Portland metropolitan area.

Local government plans must be periodically reviewed for continued compliance with the statewide goals. When LCDC determines that the local government plans are in compliance, it "acknowledges" the plans. LCDC orders regarding acknowledgment of local plans, implementing ordinances, and other reviews are subject to review in the Oregon Court of Appeals.

Previous Legislative Attempts to Provide for Compensation: Late in the 1973 Legislative session, Oregon Governor Tom McCall introduced a companion bill to SB 100 dealing with compensation for regulatory inequities. This bill, SB 849, the Land Value Adjustment Act of 1973, was developed by an advisory committee of planners, economists, developers and realtors. SB 849 tried to satisfy public and private interests in land by recognizing property as a set of collective rights, privileges, and interests. The idea was that when a land use ordinance or regulation infringed upon a portion of those rights, the value of that portion could be separated from the collectivity and be compensated.

Although there evidently was great interest in compensation, there was disagreement about the details in SB 849 and there was no mechanism to fund compensation. Consequently, a clause was added to SB 100 charging the new Joint Legislative Committee on Land Use to study and make recommendations to the next Legislative Assembly on a compensation program.

Governor McCall recognized that land use regulations would work a hardship on some property owners in some cases. In 1974, Governor McCall proposed a compensation mechanism that has become known as "windfalls for wipeouts." McCall suggested that "the landowner who suffers a monetary loss as a result of government action should be compensated to some degree for the forced change in his expectations. Second, it is equally important for the public to capture some of the benefit from government decisions which increase land values. Ideally, both sides of this proposition will balance." (McCall, Tom, *Inroads Toward Positive Land Use Management: A Land Value Adjustment Proposal*, August 29, 1974.)

A series of studies of compensation alternatives and proposed legislation followed in the 1970s and 1980s, none of which bore fruit. Nevertheless, this effort has produced a significant body of research and ideas for mitigating the tension between public and private interests in land use. Some of these ideas are incorporated into this report.

Although Oregon currently does not have a direct compensation mechanism for reductions in property value, it has provided for significant property tax abatements for farm and forest land since before the passage of SB 100. The underlying theory of these abatements is to tax these lands based on their value as farm land or forest land, and not based on the higher value that the lands might be worth if they were developed for a non-agricultural use.

3. Proponents and Opponents of Oregon's Land Use System

Perhaps because Oregon's was the first state-wide land use structure in the nation, it has attracted a number of passionate supporters and detractors. One of the prime factors in the adoption of Oregon's land use system was a desire to protect farm and forest resource lands. The land use system has evolved to pursue additional goals, but in many ways the land use system highlights and exacerbates the friction between urban and rural Oregonians, between the resource-based economy and conservationists, and between those on the "community needs" and "individual rights" ends of the property rights spectrum. A significant number of Oregonians believe that the land use system is biased in favor of environmental goals and a particular form of urban density that are imposed by bureaucrats and not supported by a majority of citizens.

This undercurrent has been evident from the initial passage of SB 100 in 1973. As early as 1976, a citizen-backed initiative would have repealed SB 100. A City Club committee recommended a "no" vote on the ballot measure, but stated in its conclusions, "Enough resentment has accumulated from the issue of compensation of landowners for property value losses due to land use restriction that the time has come for the legislature to solve this problem as provided in S.B. 100." Voters rejected the measure, with 61 percent voting against.

In 1978, another ballot measure was introduced to modify the land use regulatory structure established by SB 100. The 1978 measure would have repealed the statewide land use planning goals established by LCDC and would have required the legislature itself to establish statewide goals. Under the measure, the legislature could impose land use or zoning restrictions on "areas of statewide significance." However, "adversely affected private land owners" would be entitled to "just compensation." In recommending a vote against the measure, a City Club committee report stated, "At the worst, Measure 10 is an artfully contrived, even deceptive, attempt to accomplish by indirection the effective repeal of LCDC and any meaningful state involvement in the planning process—the same outright repeal rejected by the voters two years ago." The measure failed, with 57 percent of voters voting against.

A final initiative attempt to significantly change the framework of SB 100 occurred in 1983. The overall impact of the 1983 measure would have been to devolve most land use planning decisions to the local level and reduce the impact of statewide planning goals. A primary catalyst behind the 1983 measure was a concern for a shortage of developable industrial land, especially in the Portland area. Interestingly, the arguments in favor of the measure, at least as identified by the City Club committee analyzing the measure, focused

on the alleged impediment of land use planning to statewide economic development rather than the impact to individual property owners. This measure also failed, with 55 percent of the voters against.

There has not been a recent referendum on the Oregon land use system. However, there is anecdotal evidence that residents are becoming frustrated with some of its effects. One specific lightning rod for contention has been the issue of urban growth boundaries ("UGBs"). UGBs are some of the most visible, admired or reviled, and distinctive characteristics of the Oregon land use system. They were created in the 1970s by local governments to satisfy Goal 14. This goal defined the criteria for UGB design, but the actual boundaries were drawn by local governments through a public process, which included testimony of the local communities. Since the 1990s each UGB is required to include adequate land for the community's residential, industrial, commercial, and recreational needs for 20 years. To ensure room for expansion and development, these boundaries are adjusted every five to seven years.

Planners consider UGBs to be an important tool to divide urban and rural land. The reduction of sprawl through a UGB arguably results in more ordered and efficient extension of services and infrastructure and reduces conflicts between rural and urban uses. UGB proponents claim they save taxpayer dollars, reduce sprawl and traffic congestion, save farm and forest land, and make planning more effective.

Critics of UGBs claim they establish artificial barriers, driving up land prices inside the UGB and making housing more expensive. They also assert that UGBs and related high-density requirements lead to small lots and unnecessary crowding, forcing developers to build a product that most homebuyers do not want.

It is unclear the extent to which frustration over Oregon's land use system, including UGBs, influenced voting on Measure 7.

The conflicting themes inherent in the Oregon land use system have been debated by a number of groups, but the most notable advocates are Oregonians in Action on the side of property rights and 1000 Friends of Oregon on the side of statewide planning and "smart" development.

Oregonians in Action: Oregonians in Action (OIA) is "an association of property owners working together to protect property rights in Oregon." This lobbying organization, which promotes land use regulatory reform, was established in its current form in 1989 by Frank

Nims (a cherry farmer) and Bill Moshofsky (former Vice President, Georgia Pacific Corporation). Based in Tigard, OIA has a staff of six (with volunteers) and reports that it has over 8,000 supporters.

OIA opposes what it perceives as excessive and/or unfair land use regulations, including:

- Regulations of rural land that outlaw dwellings and land divisions.
- Restrictions on rural and urban land related to LCDC Goal 5 (concerning natural resources, scenic and historic areas, and open spaces).
- Systemic problems, including inflexible "planning" rules, excessive conditions on building permits, insufficient notice concerning new regulations to affected landowners, and burdensome procedures for appeals.
- OIA efforts focus on land use and property rights. It has sought to ease zoning, require compensation for regulatory takings, and provide relief from unfair procedures. Building on its earlier work, OIA served as a leading advocate for the passage of Measure 7.

Oregonians in Action Legal Center, a separate nonprofit organization that has been active since 1991, provides legal services without charge to landowners who may have cases that could result in precedent-setting court decisions. The Legal Center is most famous for its role in representing Dolan, in the landmark case of *Dolan vs. City of Tigard* (See page _____). OIA also has an Education Center, which educates landowners, the media and citizens about state, local and federal land use laws and regulations.

1000 Friends of Oregon: 1000 Friends of Oregon is a nonprofit charitable organization founded in 1975 by Governor Tom McCall and Henry Richmond as "the citizens' voice for land use planning that protects Oregon's quality of life from the effects of growth." Based in Portland, 1000 Friends has a staff of 13 and reports that it has over 5,000 members.

1000 Friends states that it works to:

- Conserve Oregon's productive farm, forest and range lands.
- Promote compact, livable cities with affordable housing, green spaces and transportation alternatives.
- Protect natural resources and scenic areas along the coast and across Oregon.
- Defend the opportunities for citizens to participate in the planning decisions affecting Oregon and their communities.

These objectives are to be achieved through Oregon's statewide program to plan for Oregon's growth and in conjunction with other state, local and regional land use planning efforts.

1000 Friends' work is a combination of advocacy, education and research. 1000 Friends also coordinates a statewide network of 13 local and regional organizations with a strong interest in land use and growth management.

For activities outside of the scope of a nonprofit charitable organization, the 1000 Friends Action Fund handles lobbying activities at the Oregon Legislature; monitoring, evaluating, and publicizing the records of state and local officials on land use and transportation issues; and participating in state and local initiative campaigns.

1000 Friends campaigned against Measure 7 as a serious threat to Oregon's land use system because the high cost of mandated payments to property owners would lead to the severe weakening of a broad range of land use protections. Since the 2000 election, 1000 Friends has argued that state and local governments are not authorized to waive the requirements of Oregon's land use system to avoid compensation claims.

D. 2000 Measure 7

1. Source of Measure 7

Stuart Miller was the chief petitioner for Measure 7. Your committee interviewed Stuart and Becky Miller to review the provisions of Measure 7 and to obtain background on how the measure came about.

The Millers purchased a home in southwest Portland for $63,000 in 1989. The property consisted of two adjacent R-7 zoned lots of one-half and one-sixth acre, respectively, with a house on the smaller lot. Their plan was to live in the home on the smaller lot, to subdivide the vacant one-half acre lot into two or three parcels, and to use one of the subdivided parcels for an addition to their existing home.

During 1991-92, the City of Portland implemented environmental overlay regulations for streams and creeks. Basically, the overlay prohibits building within a specified buffer zone on either side of the stream or creek. The Millers' undeveloped one-half acre lot had a stream cutting diagonally across it. An overlay was established for this stream to reduce phosphate levels and promote the return of the cutthroat salmon to the Fanno Creek watershed. Because of the

location of the stream on the property, the property became essentially undevelopable. The value of the Miller's one-half acre lot depreciated from $38,000 to $13,000 according to the Multnomah County tax assessor. Their objections to the overlay and their efforts to have the City compensate them for their loss were unsuccessful.

In the course of their involvement with policy reviews and appeals, the Millers met other property owners whose ability to develop or use their land was severely curtailed or eliminated by restrictions that were imposed sometime after they had purchased the property. They had the sense that this was a bigger problem that needed to be addressed.[5]

At that time, both Becky and Stuart Miller worked for Oregon Taxpayers United (OTU). Ms. Miller described her plight to Bill Sizemore, the director of OTU. As it happened, Sizemore had already drafted an initiative to address these types of regulatory takings, and he showed it to the Millers. The Millers indicated that the draft initiative appeared to be the answer to the problem they had experienced with the environmental overlay. They had the draft initiative reviewed by Dave Hunnicutt, legal counsel for Oregonians in Action (OIA), and the Millers told your committee that they incorporated each and every revision to the initiative suggested by Hunnicutt.

OTU supported the signature drive to get the initiative on the November 2000 ballot. However, because OTU was working to place a number of other measures on the November 2000 ballot, OIA picked up the sponsorship role for Measure 7 as a way to take their issue directly to the Oregon voters. Bill Moshofsky, the President of the OIA Legal Center, told your committee that OIA promoted Measure 7, even though OIA had some reservations about some of the language in the initiative. (This testimony was contrary to the testimony of the Millers, who stated that they had incorporated each and every change recommended by OIA's legal counsel.)

Measure 7 was one of 26 measures for voter consideration in November 2000. Discussion of Measure 7 during the campaign was limited primarily to brief capsules ("fairness," "cost," and "destroying Oregon's land use system"). It did not become a focal issue, and few commentators thought it had any chance of passage; the campaign was dominated by the national election and other initiatives supported directly by OTU. However, Measure 7 passed by a 53 percent to 47 percent margin.

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[5] A sampling of anecdotes from other property owners is attached as ***Appendix G***. Your committee has not researched all the claims of these property owners in detail. We include these anecdotes to give readers a sense of the frustrations expressed by property owners that apparently resonated with Measure 7 voters.

2. Provisions and Meaning of Measure 7

The full text of Measure 7 is set forth in ***Appendix F***. The main provisions are described below.

Compensation for Restrictive Regulations on Private Real Property: The purpose of this clause was to make compensation for the imposition of public uses on private property a constitutional requirement, with compensation to be determined by change in property value. In other words, under Measure 7, the property owner is entitled to compensation if a regulation "restricts" use of the property—a full-fledged "taking" is not a prerequisite to a compensation claim. Presumably, the right to compensation would exist even if the restriction were imposed to protect an important safety, health and welfare goal, e.g., prohibiting construction in an area subject to flooding or imposing seismic design standards.

Measure 7 would apply to state and local governments. A reduction in value of property includes not just a reduction in the fair market value of the property, but the net cost to the landowner of an affirmative obligation to protect, provide, or preserve wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archaeological or cultural resources, or low income housing.

Measure 7 contemplates cash compensation. Other forms of compensation, such as tax abatements or transferable development rights, would not qualify as compensation for Measure 7 purposes.

The Millers said they intended for Measure 7 to provide compensation only for loss in property value from decisions that restricted the use of that specific property. Claims for lost development profits, or for gains not realized because of the government denial of a request for upzoning, would not be compensable. Likewise, the impact on property value by a zoning or other decision on an adjacent property would not be covered.

Exemptions and Limitations. Measure 7 contains three main categories of exemptions and limitations under which compensation would be either barred or reduced: "historically and commonly recognized" nuisance laws, certain businesses, and federally-mandated regulations.

a. **Nuisance laws.** This clause excludes nuisance laws from the scope of compensable regulations, but limits the scope of the exception to "historically and commonly recognized" nuisance laws. There is no

single, fixed definition of what constitutes a legal nuisance. In fact, it has been observed that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"[6] Although there are a few well established activities that have been codified as "nuisances" under Oregon law (including prostitution, gambling, and illegal delivery of controlled substances), drawing a bright line between a law that promotes the general welfare (which would not be considered a law to abate a nuisance) and a law to prevent harm to the public (which would be considered a law to abate a nuisance) is virtually impossible. All laws that promote the public welfare also operate at some level to prevent harm.

So, for example, one could debate whether general zoning laws prevent harm or promote the general welfare. If it is determined that zoning rules promote the general welfare rather than prevent harm to other property, they would not be within the Measure 7 exemption. A property owner affected by zoning rules that restrict the use of property would likely be eligible for compensation under Measure 7.

In addition, limiting the exception to "historically and commonly recognized" nuisance laws effectively means that regulations limiting activities that become recognized as nuisances in the future would be compensable.

b. **Federally Mandated Regulations.** This section excludes from the class of compensable regulations any rules imposed as a result of federal law; but it, in turn, limits that exclusion to the minimum restriction necessary to comply with the federal mandate.

Witnesses to your committee identified a number of issues with this exemption. Although drafted to recognize the supremacy of the federal government over state and local governments under the U.S. Constitution, this provision fails to take into account the complex interaction between federal and state regulation. For example, some federal regulations are not mandates per se, but guidelines that may be conditions to the state's receipt of federal funds. In other words, the federal government does not always impose a mandate, but may reward the state if it adheres to certain regulations. It is not clear whether these regulations would be within the scope of the exemption.

On other issues where there is a federal mandate, there may be any number of ways for state and local governments to comply with the mandate. Whether the particular method chosen is the minimum

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[6] *Raymond v. Southern Pacific Co.*, 259 Or. 629, 633-34, 488 P.2d 460 (1971) (citation omitted).

required will be subject to debate and will be an invitation to litigation, the outcome of which in any particular case is likely to be extremely uncertain. This will present a significant budgeting challenge to the governmental entity enforcing the federal regulation and may well exert a chilling effect on that governmental entity. That, in turn, may lead to assertions by federal regulators that the state or local government is in violation of federal law.

In other words, this provision puts the entities charged with state and local enforcement of federal laws in the difficult position of having to find the balance between complying with federal mandates without going "too far" and becoming vulnerable to a Measure 7 claim.

c. **Restrictions on "Adult" Businesses.** Although some of the "adult" businesses identified in this exemption would already be exempted from compensation under the nuisance provisions, it appears that the intent of this section is to emphasize that the drafters of Measure 7 did not want local governments to have to compensate property owners who operated certain businesses generally viewed as undesirable. It is interesting to note that the Millers and Bill Moshofsky of OIA told your committee that they themselves recognize situations where community interests justify regulation of private property without compensation.

Time Limits and Retroactivity. This provision was intended to implement a simple principle: that prospective property owners have a responsibility to research all the rules that apply to a property at the time of purchase and to live with those rules after the purchase. Unfortunately, the wording selected appears to have the opposite effect of that intended by the drafters.

The difficulty is with the "first enforced or applied" language. A number of land use lawyers who appeared before your committee stated that this language means that a property owner would have a valid Measure 7 claim if the owner bought land when a particular restriction applied (e.g., a zoning ordinance) but the owner had not actually applied to use the property in the restricted way before Measure 7 was adopted. For example, a property owner in a neighborhood zoned residential may never have applied for a permit to operate a dry cleaning business. If that owner applies for a permit after Measure 7 takes effect and the local government denies the request based on the zoning ordinance, the owner would likely have a valid Measure 7 claim because the zoning restriction is "first applied" to that property owner after the effective date of Measure 7.

This reading is supported by the recent U.S. Supreme Court case of *Palazzolo v. Rhode Island*, No. 99-2047 (June 28, 2001), in which a majority of the justices ruled that landowners are not barred from bringing takings claims merely because a particular regulation was in effect prior to the time the landowner obtained title to the property.

Moreover, according to the land use lawyers interviewed by your Committee, each separate request for a particular use could give rise to a Measure 7 claim. For example, if the current or prior owner's request to operate a dry cleaner had been denied previously, the current owner could nevertheless apply to operate a fast food restaurant or a convenience store.

The provision stating that compensation is payable if the restriction "continues to apply" 90 days after the claim is filed was intended to give the rule-making entity time to rescind the rule or decision. The intent was to force quick adjudication of claims without a long, costly process and to allow the governmental entity to avoid having to pay compensation by simply waiving the restriction. There has been significant debate regarding whether this provision actually authorizes the entity to waive a regulation, since the measure does not specifically authorize waiver.

3. Additional Interpretation Questions

Measure 7's supporters noted that the measure was designed to make compensation an explicit right in the Oregon Constitution, while leaving many details to be worked out by state and local agencies and through litigation. Somewhat surprisingly, the supporters indicated that they thought that resolution of uncertainties in the measure through litigation was a positive aspect of the measure. They also pointed out that a constitutional measure would be invalidated outright for covering "multiple issues" if it had the detail and completeness of comprehensive enabling legislation.

Some of the issues that need to be resolved include:

- Funding for payment of claims and allocation of the obligation among state and local regulating entities.
- The process for submitting, deciding, and appealing claims.
- What government gets in return when it pays compensation.
- The scope of Measure 7, including whether it applies to tax laws and other laws that only indirectly affect real property (e.g., the Bottle Bill and the Beach Bill).

4. Post-Election Events

Many local government officials warned that Measure 7 could be very costly, difficult to administer, and detrimental to Oregon's land use planning system. Most local jurisdictions passed ordinances to implement Measure 7, setting out the process and rules for filing compensation claims.

Concurrently, the League of Oregon Cities, Multnomah County, the City of Beaverton and other entities and individuals joined in the consolidation of suits originally filed by Audrey McCall (wife of former Governor Tom McCall), Hector McPherson (the "father" of 1973 Senate Bill 100) and others challenging Measure 7. They alleged violations of the laws governing citizen initiatives that require the ballot measure to address only one subject and to include the full text of the portion of the Oregon Constitution to be amended. Judge Paul Lipscomb of Marion County Circuit Court granted a temporary stay pending full review of the matter on December 6, 2000 (one day before the effective date of Measure 7). On February 22, 2001, Judge Lipscomb granted a permanent stay against the enforcement of Measure 7.

Meanwhile, the legislature had taken notice of both Measure 7's passage and the apparent legal issues involved. Oregon House Speaker Mark Simmons (R-Elgin) issued a set of principles to guide the response to Measure 7. He also called for a process that would develop legislation that would respond to the perceived wishes of the voters with a workable compensation plan. Senate President Gene Derfler (R-Salem) chose not to take action, but the House did.

The first step in that process was to form a standing committee, the Land Use and Regulatory Fairness (LURF) committee, on February 23, 2001. The LURF committee was chaired by Rep. Max Williams (R-Tigard). Rep. Kurt Schrader (D-Canby) was vice-chair.

The LURF Committee held public hearings on a weekly basis, later going to two sessions per week until further hearings were canceled in late June. LURF drafted a bill, HB 3998, to provide a document for substantive discussion. In combination with a draft Joint Resolution, HB 3998 would have repealed Measure 7 and replaced it with a statutory compensation scheme. The bill sought to provide clarification of circumstances under which a landowner would be eligible for compensation and how that process would be handled. Subsequently, fourteen amendments to the bill were made in committee, but discussions stumbled primarily on the issue of funding (the same issue that stymied similar discussion in the 1970s and

1980s). When the legislature adjourned on July 7, HB 3998 died in committee. Rep. Williams, chair of LURF, indicated that the underlying difficulty preventing resolution in the 2001 Legislative Session was an unwillingness of any of the special interest groups to compromise or move from their basic positions.

The Governor's participation in the debate over HB 3998 can best be described as dispassionate, as he seemed to view other pending issues as having higher priority. He made two brief appearances before the committee but did not publicly encourage the work of the LURF committee.

At the conclusion of the regular session of the Legislature, consensus from nearly all quarters, both on and off LURF, was that this issue was one that would have to be resolved in a special session of the Legislature. A special session is likely to be called should the Oregon Supreme Court reverse the lower Court's finding and rule that Measure 7 is valid. Such a ruling would apparently create a fiscal and land use planning crisis. Sources close to the litigation speculate that a ruling could come as late as mid-2002.

Until the Supreme Court rules, Measure 7 is in limbo.

III. ARGUMENTS FOR AND AGAINST MEASURE 7

A. Arguments For Measure 7

Proponents of Measure 7 advanced the following arguments in support of the measure:

- Any restriction of use and value of land should be compensated as a matter of fairness.
- Making government consider the economic effects of its regulations brings accountability and responsibility to government action. Lack of compensation creates "great danger of excessive regulation."
- The burden of providing public benefits should be borne by all taxpayers, rather than on a small group of unfortunate property owners.
- Government can avoid large fiscal impact by not adopting regulations that would require compensation.

B. Arguments Against Measure 7

Opponents of Measure 7 advanced the following arguments against the measure:

Measure 7:

- would create lots of potentially costly litigation.
- may apply to land purchased after a law or regulation was adopted, even though any impact of such law/regulation on the property value should already be reflected in the sale price (i.e., there's no loss to the purchaser).
- does not offer a baseline property value provision, so a jury hearing a claim is without guidance about how to evaluate loss.
- has significant cost implications but does not provide a funding or payment mechanism.
- does not address owner's intended use of property that is subject to regulation. Thus, a property owner could seek compensation even if regulation did not affect that owner's intended use of his land.
- lacks a mechanism for taking into account the general benefits of zoning and other regulations that on balance increase the value of

property, i.e., the aggregate increase in property values due to zoning does not factor into the "loss" experienced by any particular property owner due to zoning restrictions.

- Government could hardly continue if it had to compensate for every reduction in value caused by regulations.
- Common law nuisance is too abstract and narrow a concept on which to base regulations in a complex and interdependent society.

IV. DISCUSSION

Following our study of the background to Measure 7 and analysis of the arguments for and against it, discussed in preceding sections, your Committee explored:

- What is the problem that needs to be solved in Oregon, which led to Measure 7?
- What are the elements of a framework for land use and regulatory fairness, which would need to underlie or follow an initiative like Measure 7?
- What broad conception of property rights and associated principles should guide the development of "son of 7" solutions?

A synthesis of our discussion follows.

A. What Is The Problem That Needs To Be Solved In Oregon?

Although Measure 7, on its face, addressed the issue of compensation for reductions in property value caused by regulations, it tapped into a range of concerns and frustrations. Witnesses to your Committee identified the following catalysts for the passage of Measure 7:

1. Unequal and perceived arbitrary effect of land use regulations on different property owners.

2. Disagreement on values with respect to the goals of land use regulation (e.g., some people believe that protection of endangered species justifies uncompensated restrictions on use of land, while others believe that such restrictions are either unjustified or must be compensated.)

3. Divergent views about which public goals are appropriate to pursue via land use regulation, as opposed to other means (e.g., some people think land use regulation should be used to protect open spaces and other people think open spaces for public benefit should be purchased).

4. Questions about the scientific justification for certain environmental regulations (e.g., whether stream buffers along the Willamette River in downtown Portland or grazing restrictions in sparsely populated areas of Eastern Oregon really help salmon).

5. Heightened sensitivity about private property rights because of the potent symbolism pertaining to private property in our culture.

6. Frustration with regulatory processes that are complex, burdensome, uncertain, costly, and/or impractical, whether based on personal experience, anecdotal evidence, or urban legends.

B. Analysis of Elements of a Framework for Land Use and Regulatory Fairness

In the course of its discussions regarding Measure 7, your committee determined that the proponents of Measure 7 underestimated the complexity of the issues involving compensation for regulatory takings, or, if they did understand the complexity, they downplayed it during the election campaign. Your committee identified at least 17 separate but interdependent factors that should be considered in evaluating or developing a compensation system. While a complete analysis of all of these factors could fill many volumes and therefore is beyond the scope of this report, a flavor of the complexity attendant to each of them is provided by the following discussion.

1. Type of Landowner Entitled to Compensation

The starting point for analysis of a compensation scheme is whether certain types of landowners should be excepted from compensation. We heard from the drafters of Measure 7 that their primary focus seemed to be on individual landowners—such as themselves—who wanted to build a primary residence on a single residential lot in an already developed area. Certainly, this type of landowner was the primary focus of the advertising campaign in favor of Measure 7.

However, philosophically, your committee also considered that all citizens (broadly read to include corporations and other entities) are entitled to equal protection under the law and identified some situations where limiting relief to individual landowners would not alleviate the perceived inequities that animated the Measure 7 proponents. For example, your committee heard from individuals who testified that they had purchased land for investment purposes at a time when the property was clearly zoned to allow two-acre home sites. These owners told the committee that, shortly after the purchase, the land was down-zoned to exclusive farm use, effectively prohibiting the construction of any homes on the property. (See ***Appendix G*** for more background on this situation.) If one accepts that these individuals suffered a loss when the rules changed after they had made their investment, their loss is arguably as great (and greater in terms of dollars) as the loss of the individual who wanted to build a single residence.

Your committee also considered whether governmental property owners should be eligible for compensation where, for example, a separate governmental entity imposed a restriction on the use of property. On the one hand, compensation in this situation is consistent with the principle that one level of government should not be able to impose unfunded mandates on a lower level of government, a principle that seems popular with Oregon voters. Also, allowing compensation for government owners protects the taxpayers within the boundaries of the aggrieved entity from impositions by a different governmental entity that may not be as concerned about the fiscal impact on a discrete minority. (For example, the state government may impose a burden on a single city, realizing that the sheer numbers of the statewide population would dilute a revolt of the citizens of the single city). Viewed in this light, government-to-government compensation is merely a subset of the broader principle Measure 7 supporters argue that they are supporting-protection of individuals against the tyranny of the majority.

On the other hand, your committee was concerned that including governments in the group of eligible property owners might stretch to the breaking point already limited funds available for Measure 7 type claims. Your committee also questioned whether government-to-government mandates are really part of the problem voters thought they were addressing when they voted for Measure 7. Finally, your committee considered that it might be appropriate to exclude governmental property owners from compensation because they, unlike private owners, do not pay property tax on their holdings.

2. Type of Property

Your committee considered whether it is appropriate to treat certain types of land differently for purposes of compensation claims. We identified at least six different types of property that raise different concerns: rural lands, urban lands (within or just outside an urban growth boundary), coastal lands, Willamette Valley lands versus other parts of Oregon, developed land versus undeveloped land, and farm/forest land.

We noted that each of these types of lands faces specific development pressures and carrying limits, certain historical and evolving uses, and certain emotional or subjective values to the people of Oregon. A compensation scheme could establish different rules depending on these factors, but the increase in complexity may outweigh the benefits of targeted provisions. Ultimately, these considerations likely need to be weighed on a case-by-case basis.

3. Triggering Event for A Claim

In this category, your committee considered when a reduction in value would be considered concrete enough to give rise to a claim for compensation. For example, we considered that any of the following events might demonstrate sufficient evidence of a loss:

- actual sale of property below its expected value without the land use restriction;
- drop in assessed or appraised value without actual sale;
- loss of future revenue stream from lost investment opportunity;
- cost of compliance with regulations; and
- temporary loss of use of property (e.g., property zoned exclusive farm use but eventually brought within urban growth boundary).

Our appraiser witnesses testified that these events are themselves interrelated because the value of residential rental property, commercial property, and industrial property is determined in part by the expected revenue stream from the revenue-generating activities conducted on the property.

Your committee considered the idea of requiring an actual sale of the property to give rise to a compensation right. Arguments in favor of this requirement include:

- an element of speculation and subjectivity is removed because one variable in the compensation equation (the value of the land with the land use restriction) becomes fixed;
- windfalls will be reduced because the property owner would not be able to treat the compensation system like a lottery on the theory that even if they did not obtain compensation, they still would have the property;
- similar to the preceding bullet, the property owner would not get the value of the proposed use without the investment of time, energy or risk (e.g., without a sale requirement, if the owner could obtain compensation based on denial of permission to build a fast-food restaurant, why take the risk of actually building the restaurant?);
- assuming that a willing buyer exists who can accept the restrictions on the property, and the compensation allows the original owner to buy replacement property not subject to the same restriction, development will eventually be steered to the locations where planners intend;

- the government should not be in the business of compensating unrealized losses—today's prohibited use may result in a higher value at a later date, in which case the owner would have received a true windfall;
- it is likely that the original flood of claims could be avoided due to the time needed to prepare the property for sale and market the property; and
- attempts to collude to set unrealistically low sales prices could be addressed by always giving the government a right of first refusal for property for which a compensation claim is made.

The sale requirement seems to work best in the commercial setting and not as well in the individual residence situation. For example, it seems unfair to force an individual who simply wants to build a single house on the family farm to sell that property in order to get compensation. Similarly, the sale requirement does not take fully into account the fact that all real property has distinct characteristics and a use restricted in one place (e.g., gold mining) may not be possible any place else.

Moreover, testimony before your committee indicated that much of the frustration motivating passage of Measure 7 was caused by restrictions on putting land to a desired use. We heard from several witnesses that they do not want a compensation "windfall," they simply want to be able to use the land in a manner that was permitted at the time they purchased it. A sale with compensation scheme would not address this motivation for Measure 7.

4. Cause of Loss

The cause of a loss in property value is important in defining the limits of a compensation scheme. We doubt that voters who supported Measure 7 would approve of compensation for reductions in property values regardless of cause or that they would endorse a government-backed guarantee that property values would never decline under any circumstances. As drafted, Measure 7 considers the cost of compliance with many environmental regulations as a reduction in property value. We suspect that many voters would find this provision problematic, at least in isolation. Another philosophical question is whether losses caused by any government action (e.g., OSHA requirements, minimum wage, etc.) should be compensated, or just losses caused by direct land use regulations.

Virtually all of the people your Committee talked to about Measure 7 said they believe the measure was intended to provide compensation for losses caused by land use regulations and not laws that do not directly regulate land use (e.g., the Bottle Bill, which indirectly requires a certain portion of some retail businesses to set aside property for processing returned beverage containers). Compensation for losses caused by actions of other private property owners is clearly is not a public responsibility and thus appears to be beyond the scope of Measure 7 itself.

5. Timing of Loss

A date would have to be selected that would establish a baseline of regulations that, although they caused declines in some property values, would not be compensable. The authors of Measure 7 intended some degree of retroactive compensation, at least to protect property owners from regulatory changes that occurred after they bought property that they currently own. Retroactive compensation could be difficult to define and apply because it is not always clear when particular past regulations first applied to a property. Also, retroactivity would likely increase the fiscal impact of a compensation scheme significantly. Finally, it may not be fair to current taxpayers to award compensation for past regulations based on standards that did not exist when the regulations were adopted.

However, a compensation system that does not allow retroactive compensation would not address the concerns of a Oregon property owners whose property was affected by past regulations and the original implementation of Oregon's land use planning system.

6. Loss Threshold For Triggering Compensation

Establishing a loss threshold removes from the compensation system claims for reductions in value that are incidental to the functions of government. This is consistent with the much-quoted statement that government could not go on if every single reduction in value had to be compensated. Some costs are simply the consequence of living in a complex society. Loss thresholds, such as the following, could be considered:

- A percentage reduction in the total value of the property (e.g. greater than 25 percent). This would exclude losses that are small relative to the value of the property itself. Moreover, appraisals tend to vary from one appraiser to another for the same property, so setting a percentage reduction trigger would exclude losses that are essentially within the "margin of error" of appraisals.

- A minimum dollar amount of loss (e.g., $10,000). This type of trigger would ensure that claims are submitted only for losses that exceed the cost to process the claim.

7. Limits On Amount of Compensation

Compensation could have a very big fiscal impact on state and local governments in Oregon depending on how it is structured. One way to limit this liability is to have some kind of cap on compensation. This could be a simple maximum dollar amount for any given claim, a maximum number of claims, or some combination of these two (e.g., a maximum number of claims, or maximum amount, whichever occurs first).

8. Time Limit for Filing a Compensation Claim

It is common for claims systems to have time limits for filing a claim. Time limits are normally imposed to ensure the availability of information for deciding a claim, to allow "peace of mind" after a certain period of time has passed after a potential liability-triggering event, and to provide government agencies with quick feedback on policies or actions that give rise to claims.

The framework for time limits on land use compensation claims needs to be based on the dates of one or more of the following actions:

- Adoption of the compensation system.
- Beginning of the functioning of the compensation system.
- Acquisition of real property by the landowner.
- Adoption of a regulation by a government entity.
- Application of regulation to a property.
- Enforcement of regulation with respect to a property.
- Sale or other disposition of property by the landowner.
- Timing of other remedies sought by the landowner prior to the request for compensation.

The framers of Measure 7 contemplated compensation for rules and regulations adopted, applied, or enforced after a property owner purchased a property, but set no time limit for filing a claim after one of the triggering events. Also, nothing in the language of Measure 7 specifically limits its provisions to triggering events that occur after the

enactment of Measure 7. Nor is it clear from the language of Measure 7 whether a property owner necessarily must still own the property to have a right to file a claim, or whether a current property owner can file a claim for triggering events that occurred under previous owners These questions are particularly relevant after the U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*, which at least suggests that former owners may have standing to bring takings claims in some circumstances.

A number of landowners your committee interviewed regarded compensation as a last resort. They expressed a preference for pursuing appeals within the current land use system to gain a favorable change in the application or interpretation of the effective regulations. Since the appeals process can take a decade or more, a relatively short time limit on claims would tend to force compensation claims instead of land use appeals.

Likewise, many of the current cases that provided impetus for Measure 7 started with land use decisions over twenty years ago. While a shorter time limit for filing might be appropriate once a compensation system has been functioning for a number of years, consideration has to be given to existing cases subject to lengthy appeals and for which no clear compensation mechanism was previously available.

Another argument for setting a shorter time period addresses the problem of determining "loss in real property value." Property valuations are necessarily subjective, and it may be difficult to estimate changes in property valuation at the time decisions were made ten or twenty years earlier.

9. What to Submit to File Claim

At the heart of any compensation system is the need to justify claims with objective evidence of losses for which compensation is to be paid. Any system for land use claims would have to address the following basic elements for a submittal:

- Standard form to identify the claimant, the basic elements of the claim, and compliance with time limits and other requirements.
- Payment of an application fee.
- Proof of ownership of the property involved during the relevant period.
- Documentation of the adoption, application, and/or enforcement of relevant regulations.
- Proof of loss in property value (appraisals, change in assessed value, etc.).

The question of "burden of proof" needs to be carefully defined in any claims system. In most civil cases, the burden of proof falls on the plaintiff, with the standard being "preponderance of the evidence." Given the significant public policy considerations implicated by land use regulations, it may be appropriate to set a higher standard of proof for compensation claims, such as "clear and convincing" evidence of a decline in property value.

10. Who Decides the Claim

Your committee agreed that, as a practical matter, claims typically will be decided through some form of adverse system as opposed to mediation. Mediation is only practical when all parties are willing to give up something to get to a resolution. Claims could be adjudicated by existing entities or new ones. A board of appraisers would likely have to determine the dollar amount of loss. This board could be made up of private appraisers, government tax assessors, or both. The entity deciding claims should:

- Have the appropriate knowledge and authority to be respected by all parties to a claim.
- Be able to evaluate the local details of a specific claim within the context of a statewide compensation framework.
- Adjudicate claims consistently.
- Be free of real or perceived conflicts of interest in the decision.

11. Time Limit for Decision

A key feature of Measure 7 is the establishment of a 90-day deadline for either payment of a claim or rescission of the regulation that gave rise to the claim. Historically, land use appeals can be a lengthy process, and the courts can take years to resolve all the appeal issues. Finding a way to expedite this process is in everyone's interest, as long as the quality of decisions does not suffer. Changes in land use policy are difficult to consider and implement in a short time period. As we have demonstrated, the issues involved in compensation claims are likely to be complex and multi-faceted. Instead of a 90-day limit, the American Planning Association (APA) recommends a period of 150 days to parallel the limits currently applied to LUBA appeals. Any final rules on time limits would have to take into account the time needed for orderly decision-making processes without stalling delays.

12. Forms of Compensation

Measure 7 does not specify the form compensation should take. Several alternatives could be envisioned, and combinations of these. Forms of compensation could include:

- **Cash or check.** This could include a lump sum or payment in installments (following a predetermined timeframe and payment stream).
- **Tax reduction or abatement.** This could entail a reduction or waiver of property and/or income tax in the current and/or future years, until the specified compensation level is reached or agreed time frame is met. Should reimbursement be delayed into future years, guidelines would be required.
- **Government purchases property.** This course would be more suited to certain types of claims than others. For example, this would be advisable in cases where property is stripped of all or most private value; rather than compensate the property owner for the loss, it would be appropriate to compensate the owner by purchasing the property at "fair" pre-regulation market value.
- **Government trades property for property.** The government could provide a parcel of equally valued land to the property owner, and take ownership of the property under claim. This presents challenges, as each piece of real estate has unique attributes that add and/or detract from the value, in the eyes of the owner. This option would be advisable in those cases where it is in the government's interest to own the land under claim, or where the government can provide comparable land to the owner, without forfeiting valued or potentially valuable public land.
- **Government grants easement.** This alternative would enable the property owner to gain access to government-owned property. This would be more suited to certain types of claims and property situations. For example, an owner whose property adjoins public land might be granted an easement to make specific uses of that land, as compensation for the loss associated with regulatory restrictions.
- **Government grants density bonus.** In this alternative, the government could provide the owner with a density bonus, thereby adding new value to the property as compensation for the loss. For example, an owner of residential property who is prohibited from building within a stream buffer zone, due to an environmental overlay, could be granted a density bonus that would enable conversion of the lot from single-family to duplex. Such bonuses would need to be carefully administered in light of neighborhood interests—and the potential for a density bonus to trigger neighbors' compensation claims.

13. Alternatives to Compensation

- **Government grants waiver to regulation.** There may be cases in which waiving the regulation for a specific claimant or group of claimants may be a best solution. This would not mean revoking the regulation, but merely setting it aside under specific cases in which the regulation is viewed as inordinately unfair. The granting of waivers would need to be systematically controlled, to prevent abuse and to ensure consistency across locations and over time.
- **Government rescinds regulation.**

14. Right Purchased by Government

Measure 7 is silent on the issue of what regulating agencies receive in exchange for the payment of compensation to property owners. In more traditional takings cases, there are a number of vehicles for defining and recording the government interest in a "taken" property:

- **Simple title:** the government agency becomes the owner of the property. The agency may subsequently develop the property, deed it to another entity, or sell it.
- **Easement:** the government agency acquires access or other occupation rights to selective use of the property. Easement rights are recorded and are retained by the government agency even if the underlying private property is sold to another owner. In turn, the easement rights may be sold or returned to the property owner for appropriate consideration.
- **Other rights:** mineral rights, air rights, water rights, and development rights are examples of other rights that may be acquired and documented in exchange for compensation.

A compensation system for changes in land use regulations needs to consider three key attributes of the rights that the government is acquiring in exchange for compensation:

- **Enforceability:** the acquired rights have to be documented and recorded as rights that run with the land.
- **Flexibility:** the rights acquired should parallel the rights inherent in the loss for which compensation is being paid. For example, compensation for land designated to remain as open space should be paid in exchange for development rights. Similarly, rights and compensation for a regulation that has a finite life (such as Urban

Growth Boundary limits) should be structured to recognize the temporary nature of the restriction.

- **Reversible:** the government entity owning the rights should be able to sell them back to the property owner or to other government entities as circumstances or policies change.

15. Who Pays?

Ultimately, the costs of a compensation scheme would be borne by the public. However, costs might be shouldered through various intermediate means. Your committee considered what public entity should pay for compensation claims. Three broad alternatives emerged:

- The entity that mandates lower levels of government to institute a regulation should pay. Typically, this would entail a federal or state agency (with minimal likelihood of federally-sponsored compensation).
- The entity that passes the regulation should pay. This would entail local, county or state government.
- An independent fund dedicated to cover compensation claims.
- The entity responsible for paying compensation claims could face serious financial hardship, if funding is not earmarked and available to meet revenue requirements. In addition, this entity is likely to be quite vigilant of any new regulations that have a potential to generate claims.

16. Funding for Compensation

Your committee did not analyze the potential financial implications of Measure 7. In our deliberations, we assumed that the extent of annual claims could be anywhere from $150 million (as asserted by OIA) to $5.4 billion (as stated in the Measure 7 "estimate of financial impact" in the Voters' Pamphlet). Clearly revenue requirements are an essential area of analysis, covering the magnitude of requirements in the short- and long-term in association with assorted existing and prospective regulations.

Revenue requirements will drive the determination of the appropriate source or sources of funding for a compensation program. Several alternatives could be developed to fund compensation for regulatory takings. Your committee considered criteria that could be used to evaluate sources of funding, and considered funding alternatives. Criteria for evaluating funding sources could include:

- Revenue sufficiency
- Revenue stability and availability
- Legality
- Opportunity cost
- Affordability
- Equity
- Public acceptability
- Ease of implementation and administration

Some of these criteria are not straightforward. For example, would an equitable funding mechanism be one that links costs to the beneficiaries of the regulation(s), to the beneficiaries of development, or to some other measure? Clearly, alternatives would require careful analysis, before moving forward. Given this caveat, a preliminary list of funding alternatives could include, but need not be limited to the following. Multiple sources of funding could be tapped.

- **Redirection of existing funding.** This would entail reducing or eliminating funding of other programs—changing government priorities—to free up resources to fund compensation claims. The General Fund would be a potential source of such funding.
- **Creation of new or modified taxes.** A new tax could be established or an existing tax modified to generate more revenue. Examples include:

  Real estate transfer tax. This tax is levied at the time of transfer of real property, and is paid by the buyer. Such taxes may be based on a percentage of assessed value, a flat deed registration fee, or both.

  Early property tax discount. The state could reduce or eliminate the current discount of three percent for early payment of property taxes, and earmark the savings to fund compensation.

  Tax on increases in property value. This tax, like a capital gains tax, would be triggered by increases in market value of property. This tax would be similar to a property tax but might provide for a higher tax rate on the incremental increase in value than on the "base" value. A cap could be set on maximum gains to be taxed.

Tax on exception value. This tax would be triggered when a property owner files for a permit to partition, subdivide or rezone property for development or improvements.

Sales tax. A state and/or local tax on the sale of goods and services could be established to fund compensation.

Tax on professional or other group. This could entail taxing professional groups that benefit from the costs associated with development-related regulation (such as architects, engineering firms, and land use attorneys' fees), or taxing groups that impact upon development (such as new residents to the state).

Excise taxes. These are taxes on specific goods or services, such as lodging, food/beverages, cigarettes, alcohol, automobiles, gasoline, parking spaces (or real estate transfer, or tax on a professional group). Funds generated from excise taxes are typically limited to specific related uses.

- **Other new sources of funding.** Other new sources of funding also might be considered, including:

  Profits from state-managed gambling. Revenue could be generated by expanding the Oregon lottery, introducing slot machines, or establishing other state-run gambling.

  Federal funding. Federal funding may be available to support specific regulatory efforts, such as environmental protection, freeing up funds in current budgets for compensation. Federal funding is unlikely to support compensation directly.

  Sale of public land. While probably not a desirable solution, selling public land could generate funds to support a compensation program. This option would be more suitable when funds would be used to purchase land following a claim.

17. Level of Compensation

Your committee considered various alternatives in terms of the level of compensation that should be awarded to any given claimant, in relation to his/her loss. Four broad categories emerged:

- Compensate the full loss.
- Compensate a designated percentage of the loss.
- Compensation the full loss, up to a maximum of some

predetermined dollar amount.

- Compensate a designated percentage of the loss, up to a maximum of some predetermined dollar amount.

Placing a cap on compensation might be considered unfair to owners of large or valuable property. In addition, it might discourage large-scale speculation on property. However, a cap could alleviate the government's risk of extremely large claims. It addition, it would protect smaller-scale property owners against losses. Compensating a percentage of the loss would provide another means of sharing the loss between government and property owner. The percentage could be set at any designated level. Small- and large-scale property owners would be treated the same. Alternatively, a tiered system could be developed, in which property owners would receive different percentages in compensation, based on the value of the loss.

Compensation could have a very big fiscal impact on state and local governments in Oregon, depending on how it is structured. In addition to considering a maximum dollar amount for any given claim, a cap also could be placed on the number of claims that would be awarded during a given timeframe or in association with a particular regulation (meaning that not all property owners would be treated equally). Another option might be to establish a limited pool for compensation during a specified period of time (such as one to five years), and provide payment until that pool is exhausted.

V. CONCLUSIONS: PROPERTY RIGHTS PHILOSOPHY AND PRINCIPLES FOR "SON OF 7" SOLUTIONS

At the beginning of this report, we noted that there is a spectrum of opinions regarding the proper balance between private property rights and community interests. We believe it is possible to find a rough consensus among citizens as to the place on the spectrum where rights are appropriately balanced against community interests that justify restrictions on the use of property. We further believe that it is imperative that Oregonians try to find that consensus.

Concerns and frustrations over the impact of Oregon's land use laws on individual property owners have been simmering for 25 years. The legislature has not been able to provide a meaningful solution for three main reasons. First, it has been difficult to identify a consensus on where the line should be drawn on regulatory takings. Second, there has been no real impetus to change the status quo. Third, there has been a lack of political will to find the money to fund compensation for disproportionately affected landowners. The success of Measure 7 has forced the hand of policy makers, and we urge the legislature to take a proactive approach to finding a palatable alternative to Measure 7.

Measure 7 is not the answer to Oregon's regulatory takings problem. We believe that Measure 7 itself has grave flaws, both in procedure and in substance. In the hands of skilled lawyers, it likely would go far beyond even the ambitious stated goals of its drafters. Yet, we acknowledge that Measure 7 resonated with many voters because there are examples of inequities and defeated expectations that should be remedied. We do not think the campaigns adequately explained the ramifications of Measure 7. The implications of Measure 7 on the land use system, which we believe most Oregonians support, must be communicated to Oregonians.

In fact, we believe that the vast majority of Oregonians find themselves somewhere in the middle of the property rights spectrum. Property rights advocates may have to accept the fact that most Oregonians appear to favor most zoning restrictions, just as advocates for more extensive land use restrictions may have to accept that most Oregonians seem to favor the right of an individual to build at least a single family residence on land he or she owns. Similarly, advocates of restrictions must realize that broad-brush solutions often impose disproportionate impacts on some individuals, while property rights advocates must realize that Oregon's increasing population threatens its special features that will be lost forever if not protected now.

Principles: In the course of our work, we learned that the issues surrounding compensation for governmental restrictions on the use of property are extremely complex. We developed a set of principles that we believe should guide any debate over compensation for land use regulations and any legislative or initiative response to Measure 7. The principles include the following:

1. Real property is a finite resource that is subject to increasing pressures due to population growth. Society has a strong interest in protecting and regulating the use of this resource.

2. Although Oregon's current land use system may not be perfect, it is a legitimate and successful tool for accomplishing many goals that are in the public's interest.

3. The current constitutional and statutory framework of land use planning in some cases puts unfair burdens on certain landowners, and those burdens should be compensated. Government regulations can cause a loss in the value of private property that, in some cases, should be compensated.

4. The definition of a takings needs to be refined to set definite parameters on the scope of compensable takings caused by land use regulations.

5. Compensation should not be paid for alleged reductions in value resulting from regulations abating nuisances. The definition of a "nuisance" needs to be clarified and updated periodically to reflect evolving scientific knowledge, the cumulative impact of individual land use decisions, and community values.

6. Any compensation system should be codified in statutes rather than the Oregon Constitution and should emphasize certainty and stability.

7. If the government is required to pay compensation to a property owner, the government should acquire an enforceable property-related right. The government's right should be transferable. Subsequent property owners should take ownership of the land subject to the government's acquired right to restrict use of the property without further compensation.

8. The government should have options in terms of the form of compensation (such as tax abatements and property swaps, among others). These should include the option to sell back the right to engage in the restricted use at a later date.

9. Only losses of value above a certain threshold should be eligible for compensation.

10. The government should not guarantee unreasonable expectations of profit. Expectations are more likely to be reasonable if they involve continuation of a historic use or a use that was expressly permitted (e.g., under zoning laws) at the time the owner acquired the property. Speculation (e.g., of the assumed right to build a subdivision on farmland) should not be compensated.

11. The compensation scheme should set a date that establishes the baseline of regulations or restrictions that will not be compensable.

12. There should be a statute of limitations on submitting claims.

13. If an alternative to Measure 7 is presented to voters, it should include not only the compensation scheme, but also the corre sponding funding mechanism.

14. Compensation for losses by regulatory takings should be funded, to the extent practicable, by revenue generated from property owners who benefit from changes in land use regulation. This inverse corollary to takings compensation should be assessed upon the property owners' realization of profits.

15. In reviewing specific proposed land use regulations, regulators should be required to take into account the burden on private landowners (such as in a fiscal impact statement) versus the benefits to the public from the regulations and the amount of likely regulatory takings claims that will result.

Making land use planning work for positive purposes while mitigating negative side effects is a very challenging and critically important undertaking. Oregon has wrestled with this dilemma since the state's land use system was created in 1973. Regardless of how the Oregon Supreme Court rules on Measure 7, the issue is not going away. Your committee thinks the time is right to take a comprehensive look at the issue of compensation for regulatory takings. Any relief should be narrowly tailored to cases of truly unfair hardships, taking into account the principles we have set forth above.

VI. RECOMMENDATIONS

1. **Adopt Principles:** The City Club should formally and individually adopt each of the 15 principles. The Club should use these principles to evaluate any future proposals for a system of compensation for the impact of government regulations on property values.

2. **Identify Appropriate Balance:** The governor and Oregon Legislative Assembly should immediately begin a public process that will identify the appropriate balance between property rights and community interests that is acceptable to, and will be supported by, the majority of Oregonians.

3. **Develop and Implement Limited Compensation Program:** The governor and Oregon Legislative Assembly should use the input from the public process and work with interested and affected parties to craft and implement a statutory compensation program that follows the principles that we have laid out.

4. **Eliminate Measure 7 language from the Oregon Constitution:** If the Oregon Supreme Court upholds Measure 7, the Oregon Legislative Assembly should refer to voters a measure to remove Measure 7 from the Oregon Constitution.

Respectfully submitted,

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VII. APPENDICES

A. Glossary of Terms

Chilling Effect: The result in which legislatures or other regulatory agencies are inhibited in the creation or implementation of new regulations because of potential fiscal implications of the new rules, many of which are difficult to anticipate. There can be a chilling effect on new regulations even if compensation is likely not payable because of the costs of litigation to prove the case. The quandary is exacerbated by the fact that typically no state or local funding is available for compensation.

Community Plans: Under Oregon system, plans which provide specific land use designations on property within the unincorporated urban area of a county and also provide detailed policy direction to guide development based on community needs and desires.

Condemnation: The taking of private property for public use, subject to laws of just compensation.

Density: A measurement of the number of people or dwelling units in relationship to a specified amount of land, for example, the number of dwelling units per gross acre. Density is a measurement used generally for residential uses, and does not include land devoted to streets.

DLCD: Department of Land Conservation and Development. Administrative (staff) arm of LCDC.

Easement: A non-ownership right held by a person, or the public, to use the land of another.

EFU: Land use planning designation for Exclusive Farm Use; alt: Exclusive Forestry Use; Usually referring to land originally designated with special provisions under SB100.

Eminent Domain: The power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character. The owner's lack of consent is immaterial. However, The Fifth Amendment to the U.S. Constitution, and Oregon's Constitution, require just compensation be made whenever private property is taken for public use. The process of eminent domain is commonly referred to as "condemnation" or "expropriation".

Investment backed expectations: The purchase price (i.e., the "investment") as a measure of the buyer's reasonable expectations with respect to permissible (at time of purchase) uses of the property.

LCDC: Seven member citizen commission, gubernatorial appointees confirmed by Senate, representing a population/regional formula prescribed by law. LCDC is "acknowledging" body for community plans and considers requests of local land use appeals to LUBA.

LUBA: Land Use Board of Appeals. An independent special "court" consisting of three referees appointed by the governor, confirmed by the state senate. LUBA has jurisdiction over matters involving land use and planning decisions made by local jurisdictions, hears appeals from citizens and DLCD. Appeals from LUBA go straight to Oregon Court of Appeals, then to Oregon Supreme Court.

LURF: House Standing Committee on Land Use and Regulatory Fairness, appointed by Speaker during the last general Session to deal with impact of Ballot Measure 7.

METRO: Officially designated regional land use planning authority for Washington, Multnomah and Clackamas Counties, with responsibilities to LCDC analogous to those of the other 33 counties.

Nonconforming Use: A use that was allowed by right when established or a use that obtained a required land use approval when established, but that subsequently, because of a change in the zone or zoning regulations, is now prohibited in the zone.

Nuisance: Anything which annoys or disturbs the free use of one's property, or which renders ordinary use or physical occupation uncomfortable, or which causes inconvenience or damage to another's property. It includes acts or uses that endanger life or health, give offense to the senses, violate the laws of decency, or obstruct the reasonable and comfortable use of property.

- A "Public Nuisance" is an unreasonable interference with a right common to the general public or behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.
- A "Private Nuisance" is an actionable interference with one's interest in the private use and enjoyment of one's land.

Overlay District: A supplementary district placing special restrictions or allowing special uses of land beyond those required or allowed.

- Environmental Overlay (example): A district created that imposes specific local compliance requirement to achieve broader public environmental goals.

Real Property: Land, and generally whatever is erected or growing upon or affixed to land. Also rights issuing out of, annexed to, and exercisable within or about land.

Right-of-Way: A public or private area that allows for the passage of people or goods. Right-of-way includes passageways such as freeways, streets, bike paths, alleys, and walkways. A public right-of-way is a right-of-way that is dedicated or deeded to the public use and under the control of a public agency.

Rural Area: The land area located outside an acknowledged Urban Growth Boundary.

SB100: Senate Bill 100 established statewide land use planning system in 1973. It is still considered landmark legislation for Oregon as well as a model many other states examined.

SB849: Senate Bill 849 was a companion bill to SB100. Established the principle of compensating landowners hurt by regulatory decisions; however, no funding was provided, consequently it became a law without teeth, and could not be implemented.

"Taking" or Takings": A finding that the government has appropriated a property owner's land to such an extent that compensation is payable.

UGB: Urban Growth Boundary; Legally defined line, approved by LCDC, describing limits of expected residential, industrial and commercial growth, often including unincorporated land, beyond which city services, such as water and sewer will not be extended. Farming, forestry or low density residential use is typical beyond those boundaries. UGB can be extended by cities subject to meeting criteria for state planning goals (see Appendix E).

Urban Reserve: A 20-year land supply of land adjacent to UGB and intended for urban development.

Windfalls and wipeouts: (Vernacular) Results caused by land use planning decisions, the inference being that one extreme or other are potential for land owner.

B. Witness List

Clark Balfour, land use attorney, Cable Houston Benedict, et al.
Rep. Phillip Barnhart, D-Eugene
Dick Benner, director, Land Conservation and Development Commission
Chuck Bolsinger, property owner
David Bragdon, presiding officer, Metro
Alan Brickley, vice president and legal counsel, Key Title Company
Larry Campbell, chairman, Victory Group, Inc.
Phil Chadsey, legal counsel, Boise Cascade
Dorothy Cofield, land use attorney
Arnold Cogan, principal and land use planner, Cogan Owens Cogan
Steve Cornacchia, land use attorney, and former commissioner, Lane County
Barton DeLacey, appraiser, Arthur Andersen
Sen. Gene Derfler, president, Oregon State Senate
Jill Gelineau, land use attorney, Schwabe, Williamson & Wyatt
Virginia Gustafson Lucker, legislative counsel, Land Use and Regulatory Fairness Committee, Oregon House of Representatives
Charlie Hales, commissioner, City of Portland
Shawn Higgins, property owner
Jim Huffman, dean, Northwestern School of Law, Lewis & Clark
Steve Janik, land use attorney, Ball, Janick
Colleen Jensen, member, Rosemont Property Owners Association
Stan Kahn, property owner
Art Lewellan, property owner
Robert Liberty, executive director, 1000 Friends of Oregon
Lloyd Marbet, property owner
Becky Miller, Oregon Taxpayers United
John L. Miller, architect and land use consultant
Stuart Miller, chief petitioner, Measure 7
Bill Moshofsky, vice president, Oregonians In Action
Mike Murray, property owner
Charles Off, president, Rosemont Property Owners Association
Larry Ofner, principal and appraiser, Ofner, Muscato and Henningson
Xander Patterson, Pacific Green Party
Mitch Rhose, land use planner
Andy Ried, property owner
Jeff Rogers, city attorney, City of Portland
Sumner Sharp, president, Oregon Chapter of the American Planning Association, and director of planning, Pacific Rim Resources
Chaim Sil, property owner
Mark Simmons, speaker of the house, Oregon Legislature
Ed Sullivan, land use attorney, Preston Gates & Ellis
Donald E. Tackley, Jr., valuation consultant, Tapanen Group, Inc.
Larry Tapanen, president, The Tapanen Group
Jack Walker, commissioner, Jackson County
Bill Wiley, property owner
Rep. Max Williams, chair, Land Use and Regulatory Fairness Committee, Oregon House of Representatives
Donald Joe Willis, land use attorney, Schwabe, Williamson & Wyatt

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D. Summary of Florida Statutes Addressing Fairness in Land Use Regulations

Florida

"Part I" of the Harris Act took effect on May 11, 1995. It creates a cause of action for landowners who feel that government regulation enacted after that date has placed an "inordinate burden" on their property, without actually leading to a taking under the state or U.S. constitutions. Unlike other compensation-based laws, this law does not stipulate a specific reduction in property values as a "trigger" for compensation. Instead, it defines an "inordinate burden" as an action that either denies a property owner his or her reasonable, investment-backed expectations or vested rights, or that forces the property owner to bear a disproportionate cost for the public good.

Under Part I, a government entity has 180 days from the date a property owner's claim is filed to make a settlement offer and to identify the uses to which the property in question may be put. If the owner accepts the settlement, the claim is closed. If the owner rejects the settlement, he or she can take the claim to circuit court. The courts must then determine the validity of the claim. In addition to monetary compensation, possible remedies under the act include land exchange, issuance of the requested permit, and increased allowable densities on other parts of a claimant's property.

Part II, The Dispute Resolution Act, establishes a mediation process for property rights disputes. Part II provides a separate, optional process through which property owners may attempt to resolve their grievances. This act took effect on October 1, 1995, and applies to any governmental development order or enforcement action authorized after that date. In what is a more relaxed standard than that of "inordinate burden," a landowner need only feel a government action is "unfair or "unreasonable" before pursuing this option.

Under Part II, aggrieved property owners must first exhaust all non-judicial local government appeals. After doing so, they may request relief from a "Special Master" who is selected based on agreement by both property owners and government entities. The Special Master is charged with holding a hearing and attempting to facilitate an agreement between the two parties.

If the disputing parties agree to a settlement at that time (pending approval by the appropriate government entities), the case is closed. If the Special Master is unable to mediate an agreement between the parties, he or she is required to make a written recommendation as to whether the development order or enforcement action is acceptable or requires modification. These recommendations, however, are non-binding.

E. Oregon Statewide Planning Goals

The current statewide land use framework includes goals related to:

1. CITIZEN INVOLVEMENT—Goal 1 calls for "the opportunity for citizens to be involved in all phases of the planning process." It requires each city and county to have a citizen involvement program containing six components specified in the goal. It also requires local governments to have a committee for citizen involvement (CCI) to monitor and encourage public participation in planning.

2. LAND USE PLANNING—Goal 2outlines the basic procedures of Oregon's statewide planning program. It says that land use decisions are to be made in accordance with a comprehensive plan, and that suitable "implementation ordinances" to put the plan's policies into effect must be adopted. It requires that plans be based on "factual information"; that local plans and ordinances be coordinated with those of other jurisdictions and agencies; and that plans be reviewed periodically and amended as needed. Goal 2 also contains standards for taking exceptions to statewide goals. An exception may be taken when a statewide goal cannot or should not be applied to a particular area or situation.

3. AGRICULTURAL LANDS—Goal 3 defines "agricultural lands." It then requires counties to inventory such lands and to "preserve and maintain" them through farm zoning. Details on the uses allowed in farm zones are found in ORS Chapter 215 and in Oregon Administrative Rules, Chapter 660, Division 33.

4. FOREST LANDS—This goal defines forest lands and requires counties to inventory them and adopt policies and ordinances that will "conserve forest lands for forest uses."

5. OPEN SPACES, SCENIC ANDHISTORIC AREAS AND NATURAL RESOURCES—Goal 5 covers more than a dozen natural and cultural resources such as wildlife habitats and wetlands. It establishes a process for each resource to be inventoried and evaluated. If a resource or site is found to be significant, a local government has three policy choices: preserve the resource, allow proposed uses that conflict with it, or strike some sort of a balance between the resource and the uses that would conflict with it.

6. AIR, WATER AND LANDRESOURCES QUALITY—This goal requires local comprehensive plans and implementing measures to be consistent with state and federal regulations on matters such as groundwater pollution.

7. AREAS SUBJECT TO NATURAL DISASTERS AND HAZARDS—Goal 7 deals with development in places subject to natural hazards such as floods or landslides. It requires that jurisdictions apply "appropriate safeguards" (floodplain zoning, for example) when planning for development there.

8. RECREATION NEEDS—This goal calls for each community to evaluate its areasand facilities for recreation and develop plans to deal with the projected demand for them. It also sets forth detailed standards for expedited siting of destination resorts.

9. ECONOMY OF THE STATE—Goal 9 calls for diversification and improvement of the economy. It asks communities to inventory commercial and industrial lands, project future needs for such lands, and plan and zone enough land to meet those needs.

10. HOUSING—This goal specifies that each city must plan for and accommodate needed housing types, such as multifamily and manufactured housing. It requires each

city to inventory its buildable residential lands, project future needs for such lands, and plan and zone enough buildable land to meet those needs. It also prohibits local plans from discriminating against needed housing types.

11. PUBLIC FACILITIES ANDSERVICES—Goal 11 calls for efficient planning of public services such as sewers, water, law enforcement, and fire protection. The goal's central concept is that public services should to be planned in accordance with a community's needs and capacities rather than be forced to respond to development as it occurs.

12. TRANSPORTATION—The goal aims to provide "a safe, convenient and economic transportation system." It asks for communities to address the needs of the "transportation disadvantaged."

13. ENERGY—Goal 13 declares that "land and uses developed on the land shall be managed and controlled so as to maximize the conservation of all forms of energy, based upon sound economic principles."

14. URBANIZATION—This goal requires cities to estimate future growth and needs for land and then plan and zone enough land to meet those needs. It calls for each city to establish an "urban growth boundary" (UGB) to "identify and separate urbanizable land from rural land." It specifies seven factors that must be considered in drawing up a UGB. It also lists four criteria to be applied when undeveloped land within a UGB is to be converted to urban uses.

15. WILLAMETTE GREENWAY—Goal 15 sets forth procedures for administering the 300 miles of greenway that protects the Willamette River.

16. ESTUARINE RESOURCES—This goal requires local governments to classify Oregon's 22 major estuaries in four categories:, natural, conservation, shallow-draft development, and deep-draft development. It then describes types of land uses and activities that are permissible in those "management units."

17. COASTAL SHORELANDS—The goal defines a planning area bounded by the ocean beaches on the west and the coast highway (State Route 101) on the east. It specifies how certain types of land and resources there are to be managed: major marshes, for example, are to be protected. Sites best suited for unique coastal land uses (port facilities, for example) are reserved for "water-dependent" or "water related" uses.

18. BEACHES AND DUNES—Goal 18 sets planning standards for development on various types of dunes. It prohibits residential development on beaches and active foredunes, but allows some other types of development if they meet key criteria. The goal also deals with dune grading, groundwater drawdown in dunal aquifers, and the breaching of foredunes.

19. OCEAN RESOURCES—Goal 19 aims "to conserve the long-term values, benefits, and natural resources of the nearshore ocean and the continental shelf." It deals with matters such as dumping of dredge spoils and discharging of waste products into the open sea. Goal 19's main requirements are for state agencies rather than cities and counties.

F. Text of Measure 7

"If the state, a political subdivision of the state, or a local government passes or enforces a regulation that restricts the use of private real property, and the restriction has the effect of reducing the value of a property upon which the restriction is imposed, the property owner shall be paid just compensation equal to the reduction in the fair value of the property."

"For the purposes of this section, adoption or enforcement of historically and commonly recognized nuisance laws shall not be deemed to have caused a reduction the value of a property. The phrase 'historically and commonly recognized nuisance laws' shall be narrowly construed in favor of a finding that just compensation is required under this section."

"A regulating entity may impose, to the minimum extent required, a regulation to implement a requirement of federal law without payment of compensation under this section."

"Nothing in this 2000 Amendment shall require compensation due to a government regulation prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages, or other controlled substances, or operating a casino or gaming parlor."

"Compensation shall be due the property owner if the regulation was adopted, first enforced or applied after the current owner of the property became the owner, and continues to apply to the property 90 days after the owner applies for compensation under this section."

"Definitions: For purposes of this section,

regulation shall include any law, rule, ordinance, resolution, goal, or other enforceable enactment of government;

real property shall include any structure built or sited on the property, aggregate and other removable minerals, and any forest product or other crop grown on the property;

reduction in the fair market value shall mean the difference in the fair market value of the property before and after application of the regulation, and shall include the net cost to the landowner of an affirmative obligation to protect, provide, or preserve wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical,

archaeological or cultural resources, or low income housing; and

'just compensation' shall include, if a claim for compensation is denied or not fully paid within 90 days of filing, reasonable attorney fees and expenses necessary to collect the compensation.

"If any phrase, clause, or part of this section is found to be invalid by a court of competent jurisdiction, the remaining phrases, clauses, and parts shall remain in full force and effect."

G. Anecdotal Evidence of Hardships Caused by Land Use Laws

In addition to the Millers, the following property owners were among those whose experiences with Oregon land use laws were related to your committee.

1. Boise Cascade - Commercial Logging and the Endangered Species Act (Phil Chadsey, Legal Counsel)

In 1988, Boise Cascade acquired approximately 1,700 acres of land in Clatsop County, Oregon. In 1990, the Northern Spotted Owl was declared a threatened species under the federal Endangered Species Act (ESA). The Boise Cascade property had old-growth timber with a spotted owl nest. The State-adopted regulations, following suggested federal guidelines, prohibited logging on 70 acres surrounding such a nest. This affected 65 acres of the Boise Cascade property (60 of which could have been logged). At that time, the value of the protected was approximately $3,000,000.

In 1992, Boise Cascade sold all but 65 acres of the property, holding on to the acreage surrounding the spotted owl nest. In the same year, the State re-designated the restricted acreage to 56 acres surrounding the owl's nest, allowing Boise Cascade to log 4 acres of the formerly restricted property.

Boise Cascade has been litigating this case since 1992, arguing that the physical occupation of the owls was a taking. In 1996, the owls abandoned the site. By that time, the value of the property had depreciated considerably, due to the decline in timber value. In 1997, a jury awarded $1.8 million to the company for the temporary taking of the property, between 1992 and 1997. The verdict was reversed on appeal over the issue of whether the case was "ripe" for litigation because Boise Cascade had not applied to the U.S. Fish & Wildlife Service for an incidental take permit under the ESA for the owls, which, if granted would have allowed the state to have authorized the logging under state law. The case continues to be tied up in litigation.

2. Donald Tackley's Property in Deschutes County

In May 1995, Donald Tackley purchased a lot in the Deschutes River Recreational Ranch subdivision. The subdivision is about 5 miles south of Sunriver and is made up of lots about 1 acre in size. Mr. Tackley paid $15,000 for his lot and then made improvements, including a well and septic system, with the intention of eventually building a house.

Before he was prepared to build, the county proposed a minimum lot area requirement of 1.5 acres to build new dwellings. This requirement was proposed to protect the area residents because, at the existing density, the aquifer, upon which the residents depend for drinking water, was expected to become polluted. The alternative would have been to build a sewer system, but the area residents were unwilling to support this.

In response to this re-zoning, Mr. Tackley sold his property to someone who was prepared to build before the proposed lot area requirement would take effect and recovered his investment, but he felt that others might not have been so lucky.

As "compensation" for the lost right to build on his property, the county offered him (and other affected property owners) the right to purchase other land on or near Highway 97. He would have had to pay market price for the land, and would have received no discount or monetary allowances in compensation for the diminished value of his previous lot. He declined the offer.

According to Mr. Tackley, the county subsequently did not impose the 1.5 acre requirement, but he did not anticipate this change in position and had already sold his property.

3. Charlie Hoff and Colleen Jensen's property in the Rosemont area of Clackamas Co.

In 1978 the Hoffs and the Jensens purchased 53 acres of land in the Rosemont area between Lake Oswego and West Linn. The original zoning allowed residences to be built on two-acre lots. At this time the area was relatively undeveloped, and there were existing houses on lots as small as half an acre. In other parts of the area to the south, the zoning required a five-acre minimum to build new houses.

In 1980 an EFU-20 (exclusive farm use, 20-acre) zone was applied to the property. This property was not viable as farmland because it lacked an irrigation source, and there was no existing commercial

farming in the immediate vicinity. The EFU-20 designation precluded residential development.

In the early 1990s the Hoffs and Jensens, along with other property owners in the area, established the Rosemont Property Owner's Association. This group of about 20 property owners hired professional planners to design a plan, and petitioned Metro for inclusion in Portland's Urban Growth Boundary (UGB). This is a complex and costly process. The plan covers a total area of 750 acres, and includes a mixture of densities and uses (including commercial). The average density of the plan is approximately 10 units per acre.

In 2000 Metro extended the UGB to include the Rosemont Property Owners' property, but development is still not allowed. Currently the UGB inclusion of the property is being contested by the City of Lake Oswego, which alleges that the development of this property will overburden its schools, create sewer problems, and increase traffic. According to the property owners, Lake Oswego is closing schools, there are a variety of solutions to the sewage disposal issue, and the area has excellent access to Interstate 205.

More than 20 years after it was purchased for development, this property remains undeveloped and the property owners have received no return on their investment. Mr. Hoff and Ms. Jensen indicated that they would be satisfied if they could build two-acre homes on the property, as permitted at the time they bought the property in 1978.

H. Compensation Provisions of the Job Creation and Wage Enhancement Act of 1995 (Passed by U.S. House of Representatives, Died in Senate)

SEC. 203. RIGHT TO COMPENSATION.

(a) In General. The Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the Federal Government shall buy that portion of the property for its fair market value.

(b) Duration of Limitation on Use. Property with respect to which compensation has been paid under this Act shall not thereafter be used contrary to the limitation imposed by the agency action, even if that action is later rescinded or otherwise

vitiated. However, if that action is later rescinded or otherwise vitiated, and the owner elects to refund the amount of the compensation, adjusted for inflation, to the Treasury of the United States, the property may be so used.

SEC. 204. EFFECT OF STATE LAW.

If a use is a nuisance as defined by the law of a State or is already prohibited under a local zoning ordinance, no compensation shall be made under this division with respect to a limitation on that use.

SEC. 205. EXCEPTIONS.

(a) Prevention of Hazard to Health or Safety or Damage to Specific Property. No compensation shall be made under this division with respect to an agency action the primary purpose of which is to prevent an identifiable
(1) hazard to public health or safety; or
(2) damage to specific property other than the property whose use is limited.

(b) Navigation Servitude. No compensation shall be made under this division with respect to an agency action pursuant to the Federal navigation servitude, as defined by the courts of the United States, except to the extent such servitude is interpreted to apply to wetlands.

SEC. 206. PROCEDURE.

(a) Request Of Owner. An owner seeking compensation under this division shall make a written request for compensation to the agency whose agency action resulted in the limitation. No such request may be made later than 180 days after the owner receives actual notice of that agency action.

(b) Negotiations. The agency may bargain with that owner to establish the amount of the compensation. If the agency and the owner agree to such an amount, the agency shall promptly pay the owner the amount agreed upon.

(c) Choice Of Remedies. If, not later than 180 days after the written request is made, the parties do not come to an agreement as to the right to and amount of compensation, the owner may choose to take the matter to binding arbitration or seek compensation in a civil action.

(d) Arbitration. The procedures that govern the arbitration shall, as nearly as practicable, be those established under title 9, United States Code, for arbitration proceedings to which that title applies. An award made in such arbitration shall include a reasonable attorney's fee and other arbitration costs (including appraisal fees). The agency shall promptly pay any award made to the owner.

(e) Civil Action. An owner who does not choose arbitration, or who does not receive prompt payment when required by this section, may obtain appropriate relief in a civil action against the agency. An owner who prevails in a civil action under this section shall be entitled to, and the agency shall be liable for, a reasonable attorney's fee and other litigation costs (including appraisal fees). The court shall award interest on the amount of any compensation from the time of the limitation.

(f) Source Of Payments. Any payment made under this section to an owner, and any judgment obtained by an owner in a civil action under this section shall, notwithstanding any other pro vision of law, be made from the annual appropriation of the agency whose action occasioned the payment or judgment. If the agency action resulted from a requirement imposed by another agency, then the agency making the payment or satis fying the judgment may seek partial or complete reimbursement from the appropriated funds of the other agency. For this purpose the head of the agency concerned may transfer or reprogram any appropriated funds available to the agency. If insufficient funds exist for the payment or to satisfy the judgment, it shall be the duty of the head of the agency to seek the appropriation of such funds for the next fiscal year.

SEC. 207. LIMITATION.

Notwithstanding any other provision of law, any obligation of the United States to make any payment under this division shall be subject to the availability of appropriations.

SEC. 208. DUTY OF NOTICE TO OWNERS.

Whenever an agency takes an agency action limiting the use of private property, the agency shall give appropriate notice to the owners of that property directly affected explaining their rights under this division and the procedures for obtaining any compensation that may be due to them under this division.
SEC. 209. RULES OF CONSTRUCTION.

(a) EFFECT ON CONSTITUTIONAL RIGHT TO COMPENSATION- Nothing in this division shall be construed to limit any right to compensation that exists under the Constitution or under other laws of the United States.

(b) Effect Of Payment. Payment of compensation under this division (other than when the property is bought by the Federal Government at the option of the owner) shall not confer any rights on the Federal Government other than the limitation on use resulting from the agency action.

SEC. 210. DEFINITIONS.

For the purposes of this division
(1) the term 'property' means land and includes the right to use or receive water;
(2) a use of property is limited by an agency action if a particular legal right to use that property no longer exists because of the action;
(3) the term 'agency action' has the meaning given that term in section 551 of title 5, United States Code, but also includes the making of a grant to a public authority conditioned upon an action by the recipient that would constitute a limitation if done directly by the agency;
(4) the term 'agency' has the meaning given that term in section 551 of title 5, United States Code;
(5) the term 'specified regulatory law' means--
(A) section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);
(B) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);
(C) title XII of the Food Security Act of 1985 (16 U.S.C. 3801 et seq.); or
(D) with respect to an owner's right to use or receive water only--
(i) the Act of June 17, 1902, and all Acts amendatory thereof or supplementary thereto, popularly called the 'Reclamation Acts' (43 U.S.C. 371 et seq.);
(ii) the Federal Land Policy Management Act (43 U.S.C. 1701 et seq.); or
(iii) section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);
(6) the term 'fair market value' means the most probable price at which property would change hands, in a competitive and open market under all conditions requisite to a fair sale, between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having

reasonable knowledge of relevant facts, at the time the agency action occurs;

(7) the term 'State' includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States; and

(8) the term 'law of the State' includes the law of a political subdivision of a State.

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