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City Club of Portland (Portland, Or.)

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A City Club Resolution on Ballot Measure 49

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CITY CLUB RECOMMENDS “YES” VOTE ON MEASURE 49 IN NOVEMBER SPECIAL ELECTION

Analysis based on existing City Club research and previously adopted positions. Pursuant to Article X, Section 1 of the bylaws of City Club of Portland, this resolution was approved by the Research Board on August 9, 2007 and referred to the Board of Governors for adoption on September 10, 2007.

Measure 49: MODIFIES MEASURE 37; CLARIFIES RIGHT TO BUILD HOMES; LIMITS LARGE DEVELOPMENTS; PROTECTS FARMS, FORESTS, GROUNDWATER.

RESULT OF “YES” VOTE: “Yes” vote modifies Measure 37; clarifies private landowners’ rights to build homes; extends rights to surviving spouses; limits large developments; protects farmlands, forestlands, groundwater supplies.

RESULT OF “NO” VOTE: “No” vote leaves Measure 37 unchanged; allows claims to develop large subdivisions, commercial, industrial projects on lands now reserved for residential, farm and forest uses.

SUMMARY: Modifies Measure 37 (2004) to give landowners with Measure 37 claims the right to build homes as compensation for land-use restrictions imposed after they acquired their properties. Claimants may build up to three homes if previously allowed when they acquired their properties, four to 10 homes if they can document reductions in property values that justify additional homes, but may not build more than three homes on high-value farmlands, forestlands and groundwater-restricted lands. Allows claimants to transfer homebuilding rights upon sale or transfer of properties; extends rights to surviving spouses. Authorizes future claims based on regulations that restrict residential uses of property or farm, forest practices. Disallows claims for strip malls, mines, other commercial, industrial uses. See Explanatory Statement for more information.

The complete text of Measure 49, its financial impact statement and explanatory statement can be found at www.sos.state.or.us/elections/nov62007/.

CHRONOLOGY OF LAND-USE PLANNING IN OREGON

Oregonians have grappled for decades to strike an appropriate balance between individual property rights and land-use planning for the common good. Key events in this struggle are identified below:

- 1969** Senate Bill 10 was adopted by the Oregon Legislature. The bill required every city and county to have a comprehensive land-use plan that met state standards. The law did not establish an effective enforcement mechanism or a program of technical assistance from the state, and most cities and counties refused to develop plans.
- 1973** Senate Bill 100 created the Land Conservation and Development Commission and the Department of Land Conservation and Development. Passed in the same session, Senate Bill 101 created statewide protections for farmland. LCDC's first major task was to adopt 14 statewide planning goals to govern local land-use plans.
- 1976** An initiative to repeal Senate Bill 100 was defeated.
- 1977** LCDC adopted four more goals to protect coastal resources.
- 1978** An initiative to eliminate state oversight of local land-use plans was again defeated.
- 1982** A third effort to repeal Senate Bill 100 was defeated.
- 1983** The Legislature created a process for the periodic review and update of local use plans.
- 1993** The Legislature passed a complex and controversial bill (House Bill 3661) affecting how farm and forest lands are protected.
- 1995** The Legislature considered more than 70 bills that would have changed Senate Bill 100. Most did not pass and Governor Kitzhaber vetoed the rest.

- 1997** The Legislature again rejected bills that would have changed Senate Bill 100.
- 2000** Voters passed Ballot Measure 7, a constitutional amendment intended to compensate property owners when a government land-use regulation caused a devaluation of private property.
- 2002** Measure 7 was overturned by the Oregon Supreme Court because it attempted to change more than one part of the constitution.
- 2004** Voters passed Ballot Measure 37. The statutory measure provides compensation to property owners when regulations enacted after property was purchased reduces its fair market value. In lieu of compensation, the measure also provides that the government responsible for the regulation may choose to “remove, modify or not apply” the regulation.
- 2005** Marion County Circuit Court ruled that Measure 37 was unconstitutional.
- 2006** The Oregon Supreme Court reversed the circuit court ruling, upholding Measure 37.
- 2007** The Legislature refers package of revisions to Measure 37 to voters (House Bill 3540). Voters will decide Measure 49 on November 6, 2007.

RECENT HISTORY

In November 2000, Oregon voters approved Ballot Measure 7, a constitutional amendment, which required governments to provide for compensation to real property owners in many situations where regulations reduce the value of their property. After its passage, a City Club committee analyzed the implications of Measure 7 and released a report in 2002. The committee's report, which was adopted by the membership, recommended removal of Measure 7 from the Oregon Constitution and adoption of 15 principles that could provide an analytical framework for considering amendments to Oregon's land-use system.

On October 4, 2002, the Oregon Supreme Court invalidated Measure 7, concluding that the measure violated the requirement that constitutional amendments proposed by citizen initiatives encompass only one subject. Two years later, voters passed a similar statutory measure—Measure 37—which retained the basic philosophical approach of Measure 7: when the value of real property is reduced by a regulation, the government should compensate the property owner under broader circumstances than those required by the U.S. Constitution—or waive the regulation in lieu of paying compensation.

As of May 2007, the state Department of Land Conservation and Development reports about 6,700 claims have been filed under Measure 37, and more than \$19 billion in compensation has been requested for these claims. Approximately one-third of the claims (and one-third of the total acreage subject to claims) involve land zoned for exclusive farm use. The majority of these claims are in particularly high-value farmland in Hood River County and the Willamette Valley. Some Measure 37

claimants assert the right to build hundreds of houses in new rural subdivisions.

In its 2007 session, the Oregon Legislature considered a number of possible revisions to Measure 37. The Legislature ultimately referred House Bill 3540 to a vote of the public on November 6, 2007. The bill will become effective only if voters approve Measure 49 in November.

Using the 15 principles adopted by the Club in 2002 as a basis for evaluating Measure 37, City Club adopted a resolution opposing Measure 37 in 2004. Today, with a position opposing Measure 37 already established, determining the Club's position on Measure 49 hinges on whether the land-use laws that would be created by Measure 49 would be more consistent with City Club's principles than current law as enacted by Measure 37. Based on the application of previously adopted City Club research, the Research Board and Board of Governors conclude that Measure 49 would improve current law.

KEY PROVISIONS OF MEASURE 49

Like Measure 37, the regulations in effect when the property owner purchased the property provide the base line for the compensation analysis. Measure 49 would divide claims into those filed before, and those filed after, the adjournment of the 2007 legislative session (June 28, 2007).

CLAIMS FILED ON OR BEFORE JUNE 28, 2007.

For claims filed on or before June 28, 2007 (pre-adjournment claims), Measure 49 gives a claimant three options. The first option, referred to as the "express lane," allows up to three home sites on the land that was the

subject of the Measure 37 claim without the claimant having to show that a regulation reduced the value of the property. However, the claimant does have to establish that the number of home sites would have been permitted under the rules in effect at the time the property was acquired by the claimant.

The second option is for a claimant who wants more than three home sites. This claimant must prove that a land-use regulation caused a reduction in value, and the reduction must be documented with an appraisal showing the value of the land one-year before and one-year after the regulation took effect. The amount of the reduction is increased by interest to the present day and then divided by the current value of a home site to arrive at the additional number of home sites that may be approved. The result is limited to 10 home sites per property and 20 home sites per claimant statewide. This option is not available if the property is located both (1) outside an urban growth boundary and (2) on high-value farmland, high-value forestland, or in a ground water restricted area.

The third option is for the claimant to pursue his or her rights under Measure 37 as passed in 2004. To qualify for this option, by the effective date of Measure 49 (if it passes), the claimant must have obtained a waiver of a land-use regulation under Measure 37 and must have a “common law vested right” to continue the use described in the waiver. Generally, this will mean that the claimant must have taken substantial steps to use the property in a way permitted by the waiver.

Under the first and second options, the home sites are limited in size and must be clustered in order to preserve the productivity of the remainder of the property. There is no deadline by which

the property owner (Measure 49 claimant) has to develop the home sites. The right to develop home sites can be transferred by the owner to an unrelated purchaser, but the purchaser (transferee owner) must exercise the right within 10 years after the conveyance.

The “grandfathered” Measure 37 rights under option three cannot be transferred.

Once a property owner obtains relief under any of these options, the property owner cannot make any further claims for compensation for any land-use regulation enacted before January 1, 2007.

CLAIMS FILED AFTER JUNE 28, 2007.

For claims filed after June 28, 2007, compensation is available if the claimant’s desired use is a residential, farming or forest practice use, and a land-use regulation enacted after January 1, 2007 restricts the use. Measure 49 defines a “land-use regulation” primarily as a restriction on *residential* uses. Consequently, compensation generally would not be available under Measure 49 if a particular regulation restricted a commercial use of the property (e.g., if zoning restricted the size or placement of billboards or retail stores.)

The claimant must show a reduction in the fair market value of the property as a result of the enactment of the land-use regulation. Again, this reduction is measured by the decrease in the value of the property, by comparing the value of the property one year before enactment of the land-use regulation and one year after enactment of the land-use regulation, increased by an interest rate through the date the claim is filed. These claims must be filed within five years after the land-use regulation was enacted.

ANALYSIS OF MEASURE 49 IN CONTEXT OF CITY CLUB'S PRINCIPLES ON LAND-USE TAKINGS

City Club adopted a set of principles in 2002 to guide debate over compensation for property owners for regulatory restrictions on the use of their property. Following is a side-by-side comparison of those principles with Measure 49 relative to current law under Measure 37.

CITY CLUB PRINCIPLES

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.

ANALYSIS



Measure 37 exempts a significant number of Oregon landowners from the regulations that have guided land use in Oregon for more than 30 years. It creates inconsistent rules, depending solely on when a property-owner purchased the property, invites patchwork development of property, and is the antithesis of sound planning.

Measure 49 would leave Oregon's traditional (pre-Measure 37) statewide land-use planning system largely intact by circumscribing the type of land-use regulations that will give rise to a claim and by removing the possibility of windfall profits. Measure 49's limits on the type and amount of development that should be permitted for claims are consistent with these principles.

CITY CLUB PRINCIPLE

3. Pre-Measure 37 constitutional and statutory framework of land-use planning in some cases puts unfair burdens on certain landowners, and those burdens should be compensated.

ANALYSIS



Measure 37 attempted to address instances of unfairness with a broad exemption from regulations adopted after a property was acquired, opening the door to uncontrolled use of certain properties while neighboring properties are subject to regulations. In this respect, it substitutes one type of unfairness for another

Measure 49 attempts to strike a balance by allowing compensation for the class of property owners who appear to have been the focus of the campaign to pass Measure 37 (i.e., property owners who want to build a relatively small number of residences on their property). It would provide less protection to larger scale property owners, who assumed the risk that they might not be able to develop their property in a particular way, than does Measure 37. Because Measure 49 is a statutory revision, future legislatures or ballot measures could modify this balance according to the desires of voters and changes in circumstances. Therefore, it should not be necessary to inquire whether Measure 49 strikes the “right” balance between regulations and property rights, only whether it strikes a “better” balance than the unrestricted right to seek compensation under Measure 37—and it does that.

CITY CLUB PRINCIPLE

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.

ANALYSIS



Measure 37 effectively defines a “taking” as any reduction in property value caused by a land-use regulation. In contrast, Measure 49 complies with this principle in two ways: (1) by limiting compensation to land-use regulations involving residential uses and (2) by providing a specific formula to determine whether a loss in value has occurred, and if it has, to determine the amount of the loss.

**CITY CLUB
PRINCIPLE**

5. Compensation should not be paid for alleged reductions in value resulting from regulations designed to abate 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.

ANALYSIS

Current law and Measure 49 both violate this principle. Both contain an exception for nuisances, but, as did Measure 37, Measure 49 requires the term to be construed narrowly in favor of granting compensation.

**CITY CLUB
PRINCIPLE**

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

ANALYSIS

Current law enacted by Measure 37 is statutory, as are the changes proposed by Measure 49. Measure 49 also makes clear how compensation claims transfer from one property owner to the next.

**CITY CLUB
PRINCIPLE**

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.

ANALYSIS

Current law does not specify what property right, if any, the governmental entity obtains if it compensates a landowner, or what happens if the governmental entity decides to waive the restriction but the landowner elects not to exercise his or her rights under the waiver.

Under Measure 49, once a claim is made with respect to a particular land-use regulation, the property owner cannot make additional claims based on the same regulation. Future owners take the land subject to the prior regulation.

CITY CLUB PRINCIPLE

8. Governments should have options in terms of the form of compensation (e.g., 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.

ANALYSIS



Current law and Measure 49 violate this principle. Both require the governmental entity imposing the regulation to “pay compensation” or waive the regulation. Although “compensation” is not defined in Measure 49, it appears that the form of compensation would be cash.

CITY CLUB PRINCIPLE

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

ANALYSIS



Current law and Measure 49 violate this principle. Neither sets a minimum threshold of reduction in value before compensation is required. Therefore, Measure 49 is not consistent with this principle.

CITY CLUB PRINCIPLE

10. Governments 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.

ANALYSIS



Current law appears to “insure” expectations of profit that are unreasonable because they are not based on continuation of a historic use or a use specifically permitted at the time the property was purchased.

Measure 49, on the other hand, would require appraisals to show loss of value based on the value of the property one year before and one year after enactment of the land-use regulation and by determining the future value of the decrease using an interest rate that reflects close to risk-free rate of return. Also, by limiting relief to approval of a certain number of residences for claims filed before June 28, 2007 claims, Measure 49 would balance the expectations of Measure 37 claimants with the expectations of neighboring property owners.

**CITY CLUB
PRINCIPLE**

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

ANALYSIS

Under Measure 37, the property owner's claim is based on the regulations in effect when the current owner or a family member of the current owner purchased the property. Family member includes stepparents, in-laws, aunts, uncles, nieces, and nephews, in addition to direct lineal descendants.

Under Measure 49, for claims filed on or before June 28, 2007, each property owner's claim is based on the regulations in effect when that particular owner purchased the property, even if that purchase occurred many years ago. This is the same conceptual approach as Measure 37. However, Measure 49 sets a ceiling on development (i.e., up to 10 home sites), whereas Measure 37 does not.

Measure 49 adopts a more recent baseline for post-adjudgment claims, as the alleged reduction in value must be attributable to a land-use regulation enacted after January 1, 2007 for these claims.

**CITY CLUB
PRINCIPLE**

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

ANALYSIS

Measure 37's two-year statute of limitations is more illusory than real because it does not start to run until the property owner submits a land-use application in which the subject regulation is an approval criterion.

Measure 49 establishes a limitations period of five years for future claims after a land-use regulation was enacted.

CITY CLUB PRINCIPLE

13. Proposed changes to Oregon’s “takings” laws should include not only the compensation scheme, but also the corresponding funding mechanism.

ANALYSIS

Current law and Measure 49 both violate this principle because neither provides a funding mechanism.



CITY CLUB PRINCIPLE

14. Compensation for losses caused 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 property owners’ realization of profits.

ANALYSIS

Neither current law nor that proposed by Measure 49 would fund payments in lieu of takings in ways consistent with this principle.



CITY CLUB PRINCIPLE

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

ANALYSIS

While both measures deal with the results of regulations once they are enacted—not the process for enacting new regulations—Measure 49 is a more reasonable attempt to balance enforcement of those regulations.



RESOLUTION

WHEREAS, City Club conducted prior research on land-use regulations and adopted a study report on April 15, 2002 that included principles by which similar measures should be judged; and

WHEREAS, City Club opposed Measure 37 in 2004 on the grounds that it was largely inconsistent with the principles adopted by the Club in 2002 and outlined above, and

WHEREAS, Measure 49 (2007) is significantly more consistent with City Club's principles than law established by Measure 37 in 2004,

NOW, THEREFORE, BE IT RESOLVED, that the Board of Governors shall publicly express City Club's support for Measure 49.

ACKNOWLEDGEMENT

The Research Board sincerely thanks Jeff Knapp for his critical contributions to City Club's analysis of Measure 7 (2000), Measure 37 (2004) and now Measure 49.

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