Oregon's Land Use Planning Program
Property Rights: Contested Compensation

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Introduction

Property rights play a unique role in American culture, and an increasingly large role in American jurisprudence. The right to own and use property, and to make a profit from that land, is a dominant political theme in America. At the same time, most Americans consent to a wide range of restrictions on the use of private property. This balance of private interests and public welfare allows for broad regulations on land use while protecting private ownership. However, the restrictions are increasingly being called into question in the legislative and judicial arenas. The focal point of the debate is whether the burden of cost for regulations weighs too heavily on private landowners. The conflict over private property regulations has met with minimal success at the policy level, but has "succeeded in reshaping public perceptions about property rights and the balance between private and public rights in land" (Land Lines, p.1).

Oregon, long known for its well-established statewide land-use planning system, was at the center of this debate when voters passed Measure 7 in November of 2000. Though subsequently struck down in the Oregon Supreme Court, Measure 7 threatened to bankrupt local governments and roll back decades of regulations and restrictions on private land use. Proponents of Measure 7 and other property rights initiatives continue their campaign to pay landowners for restrictions in the use of their property that reduce the speculative value of that land. These initiatives are cloaked in careful language with broad popular appeal, necessitating a public education campaign to undermine the long-term goals of the property rights or "wise use" movement.

UPDATE Spring 2005: With the passing of the state initiative Measure 37 in the 2004 election, the debate over property rights compensation in Oregon has become much less theoretical. The initiative passed in a large part because of its populist appeal to agreeable concepts such as 'just compensation' and 'fairness'.

The measure allows for government payment to property owners when property value has been reduced by government land use regulation. In lieu of payment, for which no sources of revenue are allocated, a waiver of the land use regulations may be instituted. The waiver would put into effect the regulations that were in place when the property was acquired by the current owner (Sullivan 2005).

Though certainly heralding a shift in the nature of land use planning in Oregon, the complexity and inconsistencies in the language of the regulation, and the practical difficulties of implementation, means that the results of imitative are far from clear (Sullivan 2005). There will be a brief commentary about the impact of Measure 37 at the conclusion of this paper.

Compensation for Regulatory Takings: Historical Justification

Compensation measures have their roots in the Takings Clause of the Fifth Amendment to the United States Constitution which states "…nor shall private property be taken for public use, without just compensation." The drafters of the federal Constitution sought to protect against the arbitrary physical appropriation of land, not to prevent regulations or restrictions on that land (Sullivan and Cropp, p.39).

The advent of "regulatory takings" came in 1922 with the US Supreme Court case *Pennsylvania Coal Co. v. Mahon*. In this case, the court held that if a "regulation goes too far it will be recognized as a taking" (GAO, p.34). This was the first time land use regulations were linked with the Takings Clause. Justice Holmes concluded that generally, the burdens borne by landowners and the benefits conveyed to the public tend to balance each other out, a condition known as "reciprocity of advantage". However, *Pennsylvania Coal* also established that it might

be possible that regulations could go so far as to be considered a taking under the Fifth Amendment (Inden, p.123). Since the inception of "regulatory takings" at this time, state and federal courts have established broad guidelines to determine when a taking has occurred and continue to evaluate takings claims on a case-by-case basis.

Growth of Property Rights Movement

In the 1980's the property rights movement, which supports a broad definition of regulatory takings, grew significantly. A conservative trend in national politics and high-profile environmental regulations involving wetlands and endangered species garnered popular support for the cause. The US Supreme Court also shifted towards more expansive rights for property owners, which also added momentum to the movement (Meltz, Sec1B, second paragraph). Oregon, which has traditionally enjoyed broad and consistent support for land use planning, experienced rapid change which increased the attention paid to land use regulation. The booming economy of the 1990's placed new pressure on the supply of developable land and "rising prices made the economic effects of regulation very noticeable" (Abbot, Adler and Howe, p.384).

The property rights movement got a surge of support in 1985, when Professor Richard Epstein published a high-profile libertarian interpretation of the takings clause, supporting an expanded definition of regulatory takings (See Epstein, *Takings: Private Property and the Power of Eminent Domain)*. His analysis advocated a shift in focus from what had been *left* to property owners to what had been *taken*, an approach employed by property rights advocates and supporters of compensation measures.

Aims: The aim of the property rights movement is two-fold:

1. To allow property owners greater latitude in the use of land and;
2. To curb government regulation of private property.

The approach of certain property rights advocates has been to influence takings cases in the courts and to support legislation that restricts regulations on land (City Club, p.8).

Compensatable Regulatory Taking

In 1992, in *Lucas v. South Carolina Coastal Council,* the United States Supreme Court held that government action that completely eliminates all viable economic use can be a compensable regulatory taking (GAO, p.31). The majority opinion in *Lucas* drew the distinction between total and partial regulatory takings. This decision ensured that government action that did not result in a total loss of value (the vast majority of regulation) would continue to be permitted. In doing so, it preempted many claims on land use regulations under the Takings Clause (Butler, pp.3-4). Property rights advocates maintain that the distinction between total and partial regulatory takings is arbitrary and illogical. They hold that any private landowner is necessarily bearing the burden of some public benefit and therefore should be compensated (Inden, pp.125-6). Since the courts have been reluctant to change their position on regulatory takings, citizen initiatives, proposed constitutional amendments, and statutory proposals have proliferated, most recently at the state and local level.

Land Use Planning Regulations in Oregon: Affects on Compensation

Oregon has offered statutory support for land use planning and regulation since the passage of Senate Bill 100 in 1973. The Bill affirmed the validity of land use planning and coordinated planning under Oregon's unique statewide planning system. The bill did not include any provisions for compensation for any type of loss incurred as a result of land use regulations (ODLCD). It did, however, call for a study of the issue by the Joint Legislative Committee on Land Use (JLCLU). In 1986, this committee stated that they had found "no evidence that land use regulations have resulted in a taking of private property." The JLCLU went further to say that the state's planning system protected property values over the long run (ODLCD). Property rights advocates, however, often distort the language used in SB 100 and claim that it did in fact call for compensation.

These advocates frequently use SB 100 to support their arguments for compensation for loss of value, such as proposed under Measure 7. SB 100, however, never mentions loss of value. It references only loss of *use*, which is the standard in determining takings cases. Property rights advocates frequently conflate these two concepts. The courts, however, have held that only regulatory takings that result in the total loss of economic value are protected by the takings

clause. Compensation legislation would be significantly more generous to property owners than takings jurisprudence is (Meltz, Sec4B, second paragraph).

"Conservative Populism": Property Rights Advocates, and Oregon

Property rights advocates and supporters of compensation measures make several claims that appeal to populist sentiment and appeal to critics of "big government." A political trend known as "conservative populism," which consists of grassroots efforts to limit government and rely on private market solutions, has become more predominant in Oregon. This approach is also skeptical of experts and expertise (Abbot, Adler and Howe, p.388).

These groups support the claim that government action that reduces the value of property should be paid to property owners. While this statement seems fair on its surface, it overlooks existing avenues for landowners to pursue compensation for measures they feel are unjust. Planners and public decision-makers have long recognized that in cases of undue hardship, some relief is justified.

Constitutional Protection

The Oregon State Constitution, like its federal counterpart, protects against the physical taking of land. Article 1, section 18 states that "private property shall not be taken for public use…without just compensation." It is generally held that this language, and that of the Fifth Amendment, was intended to prevent the appropriation of land by public bodies, and not to prevent against restrictions on the use of land. While the US Supreme Court may have strayed significantly from the original conception of "taking" by its founders, by expanding the definition of takings to include regulatory takings and partial takings, the Oregon Supreme Court has been more careful in its interpretation of the state constitution (Sullivan and Cropp, p.40; Teaney, p.2). This implies that an expansion of takings to include land use regulations is not justified under the Oregon Constitution.

Aside from this constitutionally granted protection, landowners also have the right to challenge land use regulations or actions they believe are unjust or unlawful. In Oregon, local governments must comply with strict 120-day windows for appeals decisions, and both the Land Use Board of Appeals and Oregon Court of Appeals have similar (120-day or 150-day) time restrictions. Review may also be sought in the Court of Appeals and the Oregon Supreme Court. Land use law also includes the right to grant variances in cases where unusual circumstances make the application of standard regulations inappropriate or unfair. Oregon also allows exceptions, or variances of the statewide land use planning goals, as well as property tax abatements for farm and forestland (provisions sometimes known as "givings". Takings law also protects landowners under both the state and federal constitutions. The American Planning Association believes that cases in which significant loss of value are not addressed through existing remedies are rare (APA Policy Guide; City Club, p.18).

Property Values

Another key point that advocates of compensation overlook is how land use regulations protect private property values. Land use regulations have been in place since colonial times, and zoning and other regulations were widely instituted in order to protect residents from noisy and noxious urban uses. Property values are bolstered by land regulations that protect and enhance the natural and built environment (Meltz, Sec4d, fourth paragraph). They do so by preventing conflicting uses (e.g. residential and industrial), providing more cost-effective public services through growth management and establishing parks and protecting open spaces. The problem for supporters of compensation is that the effects of planning regulations are borne by individual property owners, while the benefits are realized by the public (Abbot, Adler and Howe, p.387).

Negative Impact of Compensation Measures

Paradoxically, compensation measures that endanger such regulations could actually threaten the property rights of most landowners. The weakening of land use regulations would mean that property owners would be subject to negative consequences of neighboring uses from which they were once protected. Under such a system, protections against unwanted uses (such as drive-through restaurants) would be weakened. Most compensation measures allow protections

awarded under nuisance law to stay in effect (Charles, p.10). However, protection under nuisance law is weaker than many planning regulations, because it requires proof of harm, as well as the prospect of expensive litigation. Planning and land use regulations, on the other hand, are intended to prevent conflicting land uses before they can become a nuisance.

Furthermore, compensation measures that weaken land use regulations would mean that landowners (either individual households or corporations) could make a claim against taxpayers for not being allowed to use their land in ways that have traditionally been viewed as undesirable or even dangerous. In this way, compensation measures would threaten to roll back regulations, which protect the public health and safety, as well as the environment. They could also endanger civil rights by invalidating laws that require access for disabled people or requirements for affordable housing.

Speculative Damages

Under such measures, landowners could make claims for compensations where the loss was purely speculative. That is, a landowner could make a claim that residential zoning on her property kept her from making a profit she would have reaped if the land were zoned commercial. This would be true even if she made a profit from the residential use alone and also if she never intended to use the land commercially. Likewise, the determination of this "loss of value" is not clear-cut or easy to calculate. It is dependent on time of purchase and sale, appreciation of property values over time and neighboring market values, among other factors. Claims for compensation are frequently not based on calculations of what occurred; rather they are based on speculations of hypothetical situations.

Compensation measures would likely create many new claims for damages for which there is currently no legal basis. Such claims would be costly to process and to remedy, and ultimately this cost would be borne by taxpayers. Supporters of restrictions on public regulations are not oblivious to this fact. They recognize that it would be prohibitively expensive for public agencies to pass regulations that would potentially reduce the value of private land. The result would be deregulation of land. This would have wide-reaching impacts on the way that all levels of government do business. In the words of Justice Oliver Wendell Holmes, "[g]overnment

hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" (Meltz, Sec4D, third paragraph.

Retroactive Damages

Compensation measures that are retroactive would effectively repeal even more planning regulations. Likewise, their enforcement would be more complicated and costly. Measure 7 was one such measure that would have had broad applications and was retroactive. While the degree of retroactivity was not fully agreed upon, the economic and planning consulting firm ECONorthwest estimated claims for "lost urbanization" as a result of the Urban Growth Boundary under partial retroactivity at $3.5 billion and almost $7 billion assuming full retroactivity (Liberty, p.12).

Measure 7 would have been so wide reaching in its application because it called for compensation for "restrictions" in property use rather than full-fledged takings. It also applied to both state and local governments (City Club, p.24). Though there was some disagreement over the extent to which the measure would have been retroactive, many land use lawyers believe that Measure 7 claims could have been made against regulations that were already in place when the land was purchased, and that landowners were aware of as a condition of purchase.

The ambiguity in the measure meant that the details of implementation would have to be worked out through litigation, undoubtedly a costly and time-consuming endeavor. However, no funding source for claims or litigation was identified (City Club, p.27). One analyst has identified Measure 7 as "far and away the most extreme takings measure enacted anywhere in the United States at any level of government" (Echeverria, first paragraph).

Measure 37

Though Measure 7 was struck down in the Oregon courts, property rights interest groups continue their campaign for instituting a compensation measure in the state. The most recent incarnation of this movement is Measure 37, which recently qualified for the 2004 ballot. Unlike its predecessor, Measure 37 is a statutory measure, not a proposed constitutional amendment. While it does bear some similarity to Measure 7, Measure 37 is quite different in its approach,

and could prove to be more wide reaching in its impact than Measure 7. The language of the new measure, unsurprisingly, has at least facially broad popular appeal. The ballot title states simply that, "governments must pay owners, or forgo enforcement, when certain land use restrictions reduce property value" (OR Secretary of State).

What this means is that local governments would face a choice of waiving existing land use regulations or paying landowners to comply with them. Since the measure does not specify a funding source, and could potentially lead to billions of dollars in claims, public officials may be left with little choice but to refuse to enforce long-established land use regulations. This "pay-or-waive" requirement applies to "any statute regulating the use of land or any interest therein," which could include an extremely broad set of laws (Secretary of State). Much of the complexity of Measure 37 stems from its retroactivity. It would effectively repeal laws that have been established and accepted for many decades, as long as a family member has owned the land in question or legal entity related to the current owner at the time the challenged regulation was enacted. In practice, this would mean that each parcel of land in Oregon would be subject to a different set of laws and regulations.

Like Measure 7, Measure 37 does not specify a new funding source, nor does it create any new agency or apparatus to deal with new claims. Existing agencies will be required to pay these claims or waive the applicable regulation. Since local governments, courts and state agencies are overburdened under the current funding structure; the default position under Measure 37 will be to waive land use regulations.

In this way, Measure 37 would have the effect of removing many laws and regulations that protect property values and quality of life. The effect will be that governments may have to pay people to not build taverns, convenience stores, parking lots or other developments in locations where they are opposed by most neighbors. Further, these "pay-or-waive" decisions would not be considered land use decisions and therefore will not require public notice and hearings. Any claim that has not been paid within two years would allow the landowner to use their land according to the regulations in place at the time the property was acquired by the owner or his or

her family. The initiative "would create uncertainty for most private land owners and destabilize the value of their homes" (Beaumont).

Populist Sentiment backed by Industry

Measure 37 is the most recent in a series of citizen-driven compensation measures meant have broad appeal with citizens. The campaign it appeals to populist sentiment, which is particularly strong in the West, especially in the current context of concern over taxes. Ironically, such property rights laws will inevitably disproportionately benefit large landowners. Nationally, three-quarters of private land is held by just 5% of the landowning population (Meltz, Sec4D, fourth paragraph). Landowners who stand to benefit the most from Measure 37 or other compensation measures include agribusiness, real estate development interests and the extractive industries, such as timber, mining and oil (OLCV). Likewise, past supporters of regulatory takings measures include special interests like Texaco, Exxon, the American Mining Congress and Chemical Manufacturing Association (Ibid). While some small landowners may also benefit under compensation systems, the public should be aware that the largest benefit would be bestowed on the largest landowners.

Regardless of the fate of Measure 37 at the ballot box this fall, other property rights and compensation measures will certainly be proposed in the future, both in Oregon and nationally. Poorly drafted measures such as Measure 7 and Measure 37 are legally ambiguous and lead to costly, time-consuming litigation. The American Planning Association opposes compensation measures, and the Oregon branch of the American Planning Association (OAPA) opposed Measure 37. These groups believe that existing avenues for compensation are adequate and oppose the passage of any additional system of compensation. However, should compensation legislation be adopted, it must meet a set of carefully considered criteria to be as fair as possible. First, a funding source must be identified prior to adoption (League of Oregon Cites; City Club of Portland). To the extent possible, this revenue should be tied to private gains from land use regulation (City Club of Portland). Furthermore, a thorough and public examination of its fiscal impact should be required and the results publicized.

Next, a threshold should be set for losses that are compensable, to prevent claims on minor damages (City Club). A minimum diminution in value will prevent minor claims whose cost far outweighs the actual loss of value claimed, and will minimize the number of claims made. Likewise, the measure should establish a clear point in time beyond which claims on regulations cannot be made (i.e., prohibit retroactivity) (League of Oregon Cites). Alternatives to compensation should be permitted as well. Landowners could be granted transferable development rights or density bonuses, for example, rather than monetary awards (City Club).

Lastly, the process of drafting any legislation should be transparent open to public input. If the public truly wished to limit public regulations on land beyond existing systems, the full consequences of any action, both fiscal and practical, should be readily apparent to voters. Any compensation measure should represent the true public will, and not that of special interest groups.

Update: Planning in Oregon after Measure 37

Much of the above commentary on measure 37 has proven accurate. The measure passed by a comfortable 61-39 margin, never really in jeopardy of being defeated as a result of two primary factors.

1. The language used in the ballot title appealed to the widespread 'conservative populism' found in Oregon.
2. The many benefits of 35 years of restrictive land use planning had not been widely disseminated to the public.

Measure 37 was a poorly written measure with ambiguity, unnecessary complexity-- particularly in regard to statue of limitations-- and overlapping state and local regulations. The "significant practical difficulties" of implementation means that planning in Oregon has been thrown into a state of crisis, or at least, excessive uncertainty (Sullivan 2005, 2).

Measure 37 may weaken planning in Oregon and allow for development in previously restricted patterns, such as large housing development in farm or forestland. However, the unacceptable levels of uncertainty, for planners as well as landowners concerned with property value, may in

the end strengthen Oregon planning regulations by making a statewide review of the planning program a necessity.

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