

# TAHPDX: GREAT DECISIONS IN U.S. HISTORY

## (Teaching American History Project)

*A partnership between Portland State University and the Beaverton, Hillsboro and Forest Grove School Districts, funded by the U.S. Department of Education*

### **HISTORICAL TOPIC: Kelo v. New London Eminent Domain, Property Rights and the Public Interest**

Reeling from deindustrialization, the City of New London, Connecticut condemned the waterfront home owned by Suzette Kelo, proposing to use the power of *eminent domain* to transfer her property to a different private owner to facilitate economic redevelopment in a depressed community. Kelo resisted and took her case to the United States Supreme Court. Following earlier precedents, the Court in 2005 practiced judicial restraint and upheld the condemnation powers of the city, with the majority opinion authored by John Paul Stevens and the dissent authored by Sandra Day O'Connor. The decision touched off fierce criticism and led several states, including Oregon, to adopt laws prohibiting the use of eminent domain in the manner used by New London. The *Kelo* case is historically important because it marked a new stage in the struggle to define the proper balance between the rights of property owners and the rights of the public acting through local and state governments. We will use *Kelo* to introduce this issue, which we will then explore in the context of Oregon. Here we will examine the decisions behind Oregon's unique system of land use planning, adopted in 1973 with the leadership of Governor Tom McCall; the landmark case of *Dolan v. Tigard* in which the Supreme Court found for a small business owner against a Portland suburb; and the series of property rights referendums in the early twenty-first century (Measure 7, Measure 37, Measure 49) that left the state planning system intact but modified it to provide greater rights for individual property owners.

*The Kelo v. New London topic contains the subtopics listed below. Each subtopic includes a narrative with highlighted text [resources] and notations indicating that additional support material is available for viewing and/or downloading including primary documents, maps, spreadsheet data and websites. To access the material go to the TAHPDX: Great Decisions in U.S. History Website and use the links available on the **TOPIC AREAS [Kelo v. New London]** page or the **QUICK NAVIGATION** pages.*

Search "TAHPDX" on the internet or access the website via the link on the Community Geography page at <http://www.pdx.edu/ims/comgeo.html>.

#### **SUBTOPICS:**

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Curriculum Units developed for this topic (download using the TAHPDX website):

- Property Rights and Land Use
- Oregon's Measure 37 Google Earth Project

## 1. Introduction

For the past century, Americans, their legislators, and their courts have struggled to balance the rights of individuals to own and control their own real estate and the rights of the community to place limits on the uses of private property for the public good. No-one denies that both private and public interests are legitimate. No-one denies that it is important to draw a clear line between these competing interests. Few people agree exactly where that line should be.

This unit uses a recent 2005 decision by the U.S. Supreme Court in the case of *Suzette Kelo* versus the City of New London, Connecticut as a starting point for considering some of the ways in which these tensions have played out through history. It introduces the *Kelo* case itself, examines previous cases and arguments at the national level, and then explores how these issues have played out in Oregon.

## 2. The Kelo Case

At the turn of the twenty-first century, New London, Connecticut was a city in trouble. Hammered by deindustrialization and the closure of military facilities, it suffered from high unemployment. Locked into its boundaries by surrounding towns, it had a high proportion of tax-exempt land despite its reliance on property taxes to fund public services. In 1998, the pharmaceutical company Pfizer began to construct its Global Research Facility adjacent to the Fort Trumbull neighborhood, a waterfront district in New London of 90 acres with 115 residential and commercial parcels including a sewage treatment plant and junkyard. The city directed the New London Development Corporation, a development agency under city control, to come up with redevelopment plans for Fort Trumbull that could capitalize on Pfizer's investment and presence. The plans included a resort hotel and conference center, office and retail space, a new state park, and new residences. The Development Corporation purchased 100 of the parcels from willing sellers, but needed to use the power of *eminent domain* to acquire the other 15 parcels. New London's effort depended on \$70 million in state money, and it was the state that suggested the city should acquire Fort Trumbull under legislation authorizing economic development efforts, rather than a different statute relating to removal of blight.

Homeowner Susette Kelo and several other reluctant property owners challenged the acquisition with the argument that the Fifth and Fourteenth Amendments prohibited the city and its agents from forcibly acquiring property from one private owner simply to transfer it to another private owner or entity (in this case the New London Development Corporation and any future owners who might purchase from it). The argument hinged on the proper definition of "public use" as possibly distinct from "public purpose". The case made its way through the Connecticut Supreme Court to the Supreme Court of the United States, which heard arguments on February 22, 2005, and issued a five-to-four decision upholding the city on June 23, 2005 [**Kelo Decision: web/pdf resources**].

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**PDF Resources:**

Court Transcript of the *Oral Arguments in the Kelo v. New London Supreme Court Case* ([http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-108.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-108.pdf)).

Mikkelsen, Scott D. *Eminent Domain after Kelo v. the City of New London: Compensating for the Supreme Court's Refusal to Enforce the Fifth Amendment*. Duke Journal of Constitutional Law & Public Policy. A balanced analysis of the arguments and legislative consequences of the Kelo Case including a good description of the difference between state "police power" and the power of "eminent domain" (<http://www.law.duke.edu/journals/DJCLPP/index.php?action=showitem&id=36>).

Nolon, John R. *Property Rights and Eminent Domain: The Mighty Myths of the Kelo Case*. Pace University School of Law ([www.pace.edu/emplibary/Myths%20of%20the%20Kelo%20Case.pdf](http://www.pace.edu/emplibary/Myths%20of%20the%20Kelo%20Case.pdf)).

New York Times. *States Curbing Right to Steal Private Homes*. February 21, 2006. An article that does a good job of describing the reaction of states legislatures following the Kelo decision.

**Web Resources:**

*Kelo v. New London*. Complete transcript and links to audio arguments in this 2005 case from Justia.com (<http://supreme.justia.com/us/545/04-108/case.html>).

*Kelo v. New London Supreme Court Decisions*. A transcript Douglas' majority opinion, Kennedy's concurring opinion and O'Connor and Thomas' dissent (from FindLaw at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=04-108>).

The decision unleashed a wave of criticism, since the majority on the court sided with large impersonal institutions rather than individual property owners. The decision became an organizing point for property rights advocates. President George W. Bush in 2006 issued an **executive order** [**pdf resource**] prohibiting federal agencies from using eminent domain "merely for the purpose of advancing the economic interests of private parties to be given ownership or use of the property taken." Several states—including New Hampshire, Florida, and Oregon—moved quickly to prohibit such takings within state law, whether or not there was a record of abuse.

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**PDF Resource:** The White House. June 2006. President George W. Bush's Executive Order Protecting the Property Rights of the American People (<http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html>).

The majority decision of the court (John Paul Stevens, Anthony Kennedy, David Souter, Ruth Bader Ginsburg, Stephen Breyer) was judicially conservative. It relied on precedent, particularly the landmark case *Berman v. Parker from 1954* [[pdf resource](#)]. In that case, a small business owner in the southwest quadrant of Washington, D.C. challenged the use of eminent domain to acquire his property as part of a massive urban renewal project that turned a mixed neighborhood into middle-class housing, L'Enfant Plaza, and new federal office buildings (ironically for the Department of Housing and Urban Development and the Department of Transportation) and made Washington a national example of the possibilities and pitfalls of large scale clearance and redevelopment projects. As Clarence Thomas noted in dissent, the overwhelming majority of residents affected by the *Berman* decision were African Americans.

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**PDF Resource:** *Berman v. Parker*. A synopsis of the majority opinion in this case (from Cornell University Law School at [http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0348\\_0026\\_ZS.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0348_0026_ZS.html)).

In *Berman* the Court unanimously accepted an expansive view of public use. "It is within the power of the legislature," wrote William O. Douglas at the time, "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Fifty-one years later, a very different Supreme Court membership declined to break from the precedent and articulated the view that a carefully prepared and comprehensive redevelopment plan was strong evidence that a local jurisdiction, such as New London, had adequately defined a "public purpose" justifying the application of eminent domain.

Although property rights advocates attacked the majority decision as "judicial activism," it was anything but. It was judicially conservative not only in deferring to frequently reiterated precedents, but also in its deference to the states. The Court declined to second guess the local and state policy-making process in its particulars. At the same time, the majority showed some unease with the substantive results of the New London policy by inviting states to put their own houses in order: "Nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline."

Contrary to the criticisms, the minority (Sandra Day O'Connor, William Rehnquist, Antonin Scalia, and Clarence Thomas) were in this case the judicial activists. It is likely that the Court took *Kelo* because some members hoped that it would be an opportunity to probe behind the surface of plans and precedents to scrutinize the content and consequences of New London's actions. In effect, they were hoping to do for property rights what *Brown v. Board of Education of Topeka, Kansas* did for school integration by looking at the real world effects behind legal formulations.

Although they failed to shake loose a fifth vote, the minority were vigorous in mobilizing the examples of urban history in their published opinions. They made the argument—in a nutshell—that the use of eminent domain to promote private land development almost inevitably favors big government and big business, and victimizes poor people and minorities.

The noted urban scholar and critic *Jane Jacobs offered an "amicus" brief* [pdf resource] that reiterated her belief in the problems of large-scale planning schemes. John Norquist, former mayor of Milwaukee and now executive director for the Congress for the New Urbanism, argued that subsidies to attract corporate investment into distressed cities were nearly always flawed interventions in the market. The National Association for the Advancement of Colored People and the Southern Christian Leadership Conference argued that urban renewal had a long record of burdening the poor and disrupting their lives, and that current neo-renewal efforts have the same very strong tendency. The most frequently cited comparison was to Poletown, the low-income neighborhood that the city of Detroit leveled in order to create an in-city site for a new Cadillac plant for General Motors. The goal of the city, of course, was to bring living-wage jobs back to the city and to increase its tax base. The project cleared 1500 homes, sixteen churches, and 144 businesses. The long, failed resistance by the neighborhood has been well-documented in books and documentary film and has long been a staple topic in urban studies classes. Dissents in the Michigan Supreme Court case upholding the action, *Poletown Neighborhood Council v. City of Detroit* [resources below] have been a fertile source for property rights analysis, now expanded by its use as an example by Justices O'Connor and Thomas in an additional dissenting opinion.

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**PDF Resource:** Jane Jacob's 2005 Amicus Brief on the Kelo Case (from the Institute for Justice at [http://www.ij.org/index.php?option=com\\_content&task=view&id=1403&Itemid=165](http://www.ij.org/index.php?option=com_content&task=view&id=1403&Itemid=165)).

**PDF Resource:** *Auto Plant vs. Neighborhood: The Poletown Battle*. Detroit News (Jenny Nolan, January 27, 2000). A short history with pictures about the Poletown battle.

**Video Resource:** *Poletown Lives!* Created by George Corsetti, Jeanie Wylie and Richard Wieske. It is available in VHS, from Information Factory, 3512 Courville, Detroit MI 48224 313-885-4685.

**PDF Resource:** Corsetti, George. 2004. *Finally Some Vindication: Poletown Revisited*. The author of *Poletown Lives!* recounts the neighborhood struggle and the history of the making of the film in the wake of the Michigan Supreme Court reversal of the original Poletown decision (from Counter Punch at <http://www.counterpunch.org/corsetti09182004.html>).

New London, of course, is a victim of its context. The effort to redevelop Fort Trumbull is one more example of the distorting effects of tax-base competition. Where cities rely on property taxes, they seek to replace low-value and high-cost uses (i.e., rundown neighborhoods with lots of children) with high-value, low-cost uses (i.e., offices and condos for empty nesters). Where they depend on sales taxes, every city wants a new shopping center just inside its boundaries, where tax revenue flows to city hall but traffic crowds streets in the adjacent town. In the New London case, city officials were trying to rebalance a regional development pattern that has put the growth of tax base outside the city but burdens the inside (for the education of children of low-wage service workers).

For urban policy specialists, the case illustrates the concept of an *urban regime*—or alliance of elected and appointed officials with a specific set of private economic interests. As Justice O'Connor recognized, in most comparable property takings "the beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." The redevelopment plan clearly met Pfizer's needs for a hotel and condos to house visitors and employees, for removing eyesores, and for "doing

something" about the low-income neighborhood. Big projects such as large new mixed-use developments or convention centers not only benefit large private interests, but also make the reputations of public professionals and give elected officials something to point to in re-election campaigns. They are like playing Earl Weaver baseball, always waiting to be saved by a home run rather than playing for singles, steals, and bunts.



Susette Kelo's house in New London, Connecticut (from [castlecoalition.org](http://castlecoalition.org)).

The *Kelo* case grounded the abstractions of property rights in everyday community life. Public officials may have expertise and information on their side, but they usually come across as self-interested talking heads. In contrast, Susette Kelo could mobilize emotionally powerful language and imagery. She grew up in the neighborhood and returned to her roots in mid-life to fix up an old house. She describes herself as a "working class person." She has special animosity toward the president of upscale Connecticut College, who stated a desire to make New London a "hip city" (meaning a place for high-income people, in

Kelo's version). Kelo had repainted her house pink as she fixed it up, bringing to mind John Mellencamp's populist lyrics in *Pink Houses*:

*"Oh but ain't that America for you and me  
Ain't that America somethin' to see baby  
Ain't that American home of the free  
Little pink houses for you and me."*

### 3. Eminent Domain and Zoning

#### *Eminent Domain*

Can the government buy land for public purposes? Of course. Can it acquire land from unwilling sellers through the exercise of *eminent domain*? Yes, this is a power long established in English common law. But . . . it has to pay fair compensation and there has to be a clear public purpose to the acquisition. Both of these conditions are at the heart of debates about the use of eminent domain (as in *Kelo v. New London*), for they involve the interpretation of the ***Fifth and Fourteenth Amendments*** [**web/pdf resources**]. The Fifth Amendment states that "no person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation." The Fourteenth Amendment extends due process requirements to the states.

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**Web Resource:** *Fifth Amendment* – part of the Bill of Rights (from the National Archives at [http://www.archives.gov/exhibits/charters/bill\\_of\\_rights.html](http://www.archives.gov/exhibits/charters/bill_of_rights.html)). Website contains link to graphic of the original document and transcripts.

**PDF Resource:** *Fourteenth Amendment* (graphics of original documents from the National Archives).

These constitutional requirements are both substantive and procedural. Many attorneys have earned their living arguing the nuances of due process and debating when a government acquisition is a “taking” forbidden by the Constitution.

Procedural due process means that the acquisition process has to follow established rules and be open to judicial scrutiny. For example, property owners often think that their real estate is worth more than the government offers and must have the option of challenging that assessment in court. Sometimes the courts decide that they’re right, sometimes that they’re not.

Substantive due process is at the heart of the *Kelo* case. No-one doubts that the federal government can acquire land for a military base, or a Coast Guard station, or a post office. However, the Supreme Court in a 1937 decision held that the federal government could not acquire land for the purpose of building public housing for civilians, which is why all public housing is constructed and owned by local agencies like the Housing Authority of Portland (although the feds can help them out with funds).

The courts give leeway to individual states to define “public use” in their local context, and they have agreed that cities can acquire land through condemnation and eminent domain if the goal is to clear slums and/or provide land for important public facilities. In other words, urban renewal is OK (to the benefit, among others, of Portland State University) given certain conditions. In addition, in *Berman* and again in *Kelo* the Court agreed that states can also acquire property from unwilling sellers for the general purpose of promoting economic development. However, Oregon and several other states immediately adopted laws saying that they will not do any such thing and will not use eminent domain to transfer non-blighted property from one private owner to another.

With a 5-4 decision in *Kelo* and a strong negative reaction to the decision, the legal boundaries of eminent domain, both procedural and substantive, are still in flux.

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**PDF Resource:** *Eminent Domain*. A short description of eminent domain, public use and fair compensation from ExpertLaw ([http://www.expertlaw.com/library/real\\_estate/eminent\\_domain.html](http://www.expertlaw.com/library/real_estate/eminent_domain.html)).

**PDF Article Resource:** Kotlyarevskaya, Olga V. 2005. “Public Use” Requirement in Eminent Domain Cases Based on Slum Clearance, Elimination of Urban Blight, and Economic Development. *Connecticut Public Interest Law Journal* 5(2): 197-231. A more academic treatment of the issue of “public use” when applied to eminent domain cases.

### ***Land Use Zoning***

Zoning is the general term for governmental restrictions on certain aspects of the use of private real estate. Generally zoning codes divide a city or county into different geographic areas or zones and specify permitted building size (lot size, percent of lot coverage, setbacks from property lines, and height) and permitted uses of the buildings. Zones may range from those that allow only single-family houses on large lots to those that allow intensive industrial or commercial development.

Cities experimented with a variety of zoning efforts in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. For example, Chicago after the 1871 fire required that buildings in the core of the city be made of

brick, to reduce dangers of another conflagration. Several southern cities tried formal racial zoning, although the federal courts usually nullified these efforts. New York City is usually credited with the first comprehensive zoning ordinance in 1916, which it adopted in part to protect the upscale retailing and residential areas of Midtown Manhattan from intrusive industry. The measure, in other words, was a “conservative” effort to protect high end property values. It also required that the upper floors of skyscrapers be stepped back in a pyramid effect, to allow more sunlight to reach the streets (many of these pyramid or ziggurat buildings still stand in Manhattan).

Many other cities rushed to adopt zoning in the next decade, with the encouragement of Secretary of Commerce Herbert Hoover. Portland did so in 1924 with a simple four-zone division of the city (single family, multi-family, commercial, and industrial or “anything” goes). The division between single- and multi-family roughly matched the pattern of middle class versus working class neighborhoods. Over the years, the Portland zoning code and maps have become increasingly complex, with basic use zones and overlays of extra requirements for design districts, historic preservation districts, and the like.

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**Map Resources (Zoning Maps):**

*Portland Oregon Zoning Map* (from the City of Portland Bureau of Planning at <http://www.portlandonline.com/planning/>).

*Beaverton Oregon Zoning Map* (from the City of Beaverton [http://www.beavertonoregon.gov/departments/gis/landuse\\_maps.aspx](http://www.beavertonoregon.gov/departments/gis/landuse_maps.aspx)).

*Forest Grove Oregon Zoning Map* (from the City of Forest Grove at <http://www.forestgrove-or.gov/city-services/community-development-planning-zoning-information.html>).

**Web/Map Resource:** A link to the Hillsboro Zoning Maps can be found at <http://www.ci.hillsboro.or.us/Planning/ZoneMap/Default.aspx>. Click on your area of interest to download a pdf of the zoning map.

***Euclid v. Ambler***

Is zoning constitutional? Does it constitute an unacceptable limitation on individual property, taking away potential development possibilities without compensation? In short, is it forbidden by the Fifth Amendment?

That’s the question that the U.S. Supreme Court decided in the case of the Village of Euclid, a suburb of Cleveland, Ohio versus the Ambler Realty Company (1926). Euclid wanted to protect its residential character and homeowner property values by forbidding industrial uses. Ambler Realty Company wanted to develop a 68-acres parcel for industry and sued the city, claiming that the city’s zoning regulations had reduced the value of the land by limiting its use and was therefore an unconstitutional “taking” of the land by the city (without due process and just compensation). The Supreme Court came down solidly for zoning. The court decreed that the control and limitation of the use of land via zoning was a valid governmental purpose that could advance the public good. As long as zoning did not prohibit any and all development, and left a landowner with the chance of a reasonable economic return, the regulations were a legal extension of the city’s “police power” and did not constitute a “taking” that would require compensation.

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**PDF Resource:** *Euclid v. Ambler Realty*. A short synopsis of the history of the case with the majority opinion from FindLaw (<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=272&page=365>).

***Penn Central Transportation Company v. City of New York***

In 1978, the Supreme Court expanded the reach of zoning by ruling in favor the New York Landmarks Preservation Commission, which had denied the Penn Central Transportation Company's bid to sell and ultimately destroy the historical Grand Central Terminal in midtown Manhattan in order to build an office tower. The Court found that the railroad could continue to receive economic benefit from operating a railroad station and that the aesthetic considerations in the landmarks ordinance were a legitimate goal of public policy. Therefore, the denial of demolition was not an uncompensated "taking."

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**PDF Resource:** *Penn Central Transportation Company v. City of New York*. A synopsis and the majority opinion of the case from Harvard Law School.

## 4. Land Use and Property Rights in Oregon

### ***Making Senate Bill 100***

In 1973, Oregon took a pioneering step in land use planning. Signed into law on May 29, 1973, ***Oregon Senate Bill 100*** [pdf resource] created an institutional structure for statewide planning. It required that every Oregon city and county prepare a comprehensive plan in accordance with a set of general state goals. While preserving the principle of local responsibility for land use decisions, it simultaneously established and defined a broader public interest at the state level. Supervised by a Land Conservation and Development Commission, the Oregon system has been an effort to combine the best of these two approaches to land use planning. The very existence of Oregon's planning system has helped to inspire and justify similar programs elsewhere. Its details have been studied, copied, modified, and sometimes rejected as Florida, New Jersey, Georgia, Washington, Maryland, and other states have considered "second generation" systems of state planning.

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**PDF Resource:** *Oregon Senate Bill 100*. From the Oregon Legislative Assembly, 1973.

When the legislature adopted Senate Bill 100, formal land use planning in Oregon was just over fifty years old. The state's initial planning legislation in 1919 and 1923 granted cities the authority to develop plans and land use regulations. In a 1920 referendum, Portland voters narrowly rejected citywide zoning under the first enabling act. Four years later, they overwhelmingly approved a simpler zoning ordinance. Planning remained solely a city function until 1947, when the legislature extended similar authority to counties in response to chaotic growth of urban fringe areas during the boom years of World War II. Counties were authorized to form planning commissions, which could recommend "development patterns" (renamed

"comprehensive plans" after 1963). Unlike cities, counties were required to develop zoning and other regulations to carry out their plans.

The concern with disorderly growth that led to county planning in the 1940s grew into serious worries about suburban sprawl as Oregon began to grow rapidly in the 1960s. By the end of that decade, Willamette Valley residents from Eugene to Portland viewed sprawl much more broadly as an environmental problem that wasted irreplaceable scenery, farmland, timber, and energy. Metropolitan growth was explicitly associated with the painful example of southern California. Governor Tom McCall summarized the fears of many of his constituents in January 1973, when he spoke to the Oregon legislature about the "shameless threat to our environment and to the whole quality of life--unfettered despoiling of the land" and pointed his finger at suburbanization and second home development.

The initial impulse for state land-use legislation came from the farms rather than the cities. The center of concern was the hundred-mile-long Willamette Valley, where the blue barricade of the Coast Range on one side and the high cones of the Cascades on the other reminded residents that land is finite. The first steps toward the idea of "exclusive farm use" between 1961 and 1967 involved legislative action to set the tax rate on farm land by land rental values--in effect, by its productive capacity as farm land--rather than by comparative sales data which might reflect the demand for suburban development. A conference on "The Willamette Valley--What Is Our Future in Land Use?" held early in 1967 spread awareness of urban pressures on Oregon's agricultural base. With key members drawn from the ranks of Oregon farmers, the Legislative Interim Committee on Agriculture responded by developing the proposal that became Senate Bill 10, Oregon's first mandatory planning legislation and a precursor to Senate Bill 100.

Adopted in 1969, SB10 required cities and counties to prepare comprehensive land-use plans and zoning ordinances that met ten broad goals. The deadline was December 31, 1971. However, the legislation failed to establish mechanisms or criteria for evaluating or coordinating local plans, allowing some counties to opt for pro forma compliance. McCall's successful reelection campaign in 1970 called for strengthening SB10. At the same time, 55 percent of the state's voters supported the law in a referendum.

The Oregon legislature acted in 1973 to correct flaws in the 1969 law. A state-sponsored report by San Francisco landscape architect Lawrence Halprin on *Willamette Valley: Choices for the Future* [pdf resource] helped to set the stage in the fall of 1972. In early 1973, McCall's "*grasping wastrels*" speech [pdf resource] with its anathema on unregulated land development raised the curtain. Much credit for passage of SB 100 goes to Senator Hector Macpherson, a Linn County dairy farmer convinced of the need to fend off the suburbanization of the entire valley. Drawing on his experience on the Linn County Planning Commission, he articulated the importance of a statewide planning program in protecting and enhancing agricultural investment. When the leadership of the 1971 legislature blocked formation of a formal interim study committee, Macpherson had worked with McCall to set up an informal "Land Use Policy Committee" to suggest ways to improve SB10. Members represented the Governor's office, environmental groups, business and agricultural organizations.

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**PDF Resource:** *McCall Speech to the Legislative Assembly, 1973*, from the Oregon State Archives (see page 3 for references to land use and planning).

**PDF Resource:** Lawrence Halprin. October 1972. *Willamette Valley: Choices for the Future*. Scanned from the original book, this is an excellent account of the history of the Willamette Valley and the issues that it faced in the 1970s, filled with photos and original documents.

**PDF Resource:** The Willamette Valley Livability Forum recently prepared a “revision” or update to Halprin’s publication titled “*Choices for the Future: The Willamette Valley*.”

In drafting the new legislation, committee members relied heavily on Fred Bosselman and David Callies's book, *The Quiet Revolution in Land use Control*, published for the federal Council on Environmental Quality in 1972. The volume described state-level land planning programs in Hawaii and Vermont and a number of state efforts to protect such environmentally sensitive lands as Massachusetts wetlands and Wisconsin shorelands. Perhaps the central message for those crafting the Oregon legislation was the critical need for state programs to build in local input and ongoing participation in the planning process.

The final version of Senate Bill 100 passed both houses of the legislature by comfortable margins in May 1973. In total, forty-nine out of sixty legislators from Willamette Valley districts voted in favor of SB100. Only nine of their thirty colleagues from coastal and eastern counties agreed. The legislation created the ***Land Conservation and Development Commission*** (LCDC) [**web resource**] to oversee compliance of local planning with statewide goals. The Commission is composed of seven members appointed for four-year terms by the Governor and confirmed by the State Senate. One member is appointed from each of Oregon's five Congressional districts and two from the state at large. At least one but no more than two members must be from Multnomah County, the state's largest and most urban county. At least one member must be an elected city or county official at the time of appointment. Staff support for LCDC and the planning program comes from the Department of Land Conservation and Development.

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**Web Resource:** *Oregon Department of Land Conservation and Development* website (<http://www.lcd.state.or.us/>).

As its first task, the new LCDC rewrote the state planning goals in 1974 after dozens of workshops throughout the state. The goals of the 1969 legislation were made more clear and precise and four new goals were added. All fourteen goals were adopted in December 1974. An additional goal on the Willamette River Greenway was added in December 1975 and four goals focusing on coastal zone issues were added in December 1976 [***Summary of Oregon Land Use Goals: pdf resource***].

1. Citizen Involvement
2. Land Use Planning
3. Agricultural Land
4. Forest Lands
5. Open Spaces, Scenic and Historic Areas, and Natural Resources
6. Air, Water, and Land Resources Quality

7. Areas Subject to Natural Disaster and Hazards
8. Recreational Needs
9. Economy of the State
10. Housing
11. Public Facilities and Services
12. Transportation
13. Energy Conservation
14. Urbanization
15. Willamette River Greenway
16. Estuarine Resources
17. Coastal Shorelands
18. Beaches and Dunes
19. Ocean Resources

### ***The Oregon System in Action***

Oregon's land use program matured between 1974 and 1982. Implementation required procedural innovations. LCDC defined a formal process of "acknowledgment" to certify that local plans actually met state goals. It similarly defined a requirement for "periodic review" to make sure that plans were adapted to changing circumstances. The legislature established the Land Use Board of Appeals (LUBA) as a specialized tribunal to deal with the increasingly complex details of land use law and cases. The first local plans were acknowledged in 1976, the last nearly a decade later.

The program also survived three referendum challenges, winning voter approval by a margin of 57 percent to 43 percent in 1976 and a margin of 61 percent to 39 percent in 1978. Support was strongest in Portland, Salem, and Eugene. In 1978, the LCDC program also gathered support along the northern coast and in south-central counties where rapid recreational development had brought problems of delivery of urban services to the localities.

During the depression of 1981-82, however, LCDC became the target of frequent complaints that planning requirements inhibited economic development. Opponents of the state planning system placed an anti-LCDC measure on the November 1982 ballot, calling for the abolition of LCDC, return of all land-use planning authority to localities, and retention of state goals purely as guidelines. Editorial discussion debated the economic impacts of statewide planning, with most newspapers accepting the view that statewide planning actually encouraged economic development by requiring the designation of industrial land, stimulating tourism, and allowing large corporations to make plans for the long term. A task force headed by Umatilla agriculturalist Stafford Hansell heard testimony from more than four hundred Oregonians and reported essentially the same conclusions to Governor Vic Atiyeh. The election returns showed the same regional divisions as before, with most of the opposition from ranching counties in the southeastern corner of the state and from lumbering counties in the southwestern corner.

The 1982 referendum was the last comprehensive effort to alter the Oregon planning system for nearly two decades. A statewide economic slump from 1980 to 1986 meant little demand for new housing and few pressures for land conversion, leaving the assumptions of most local plans

unchallenged. The legislature also tried to blunt potential opposition to the Oregon system by developing alternative procedures for deciding the location of controversial public facilities such as prisons.

The main arena in which the Oregon system has addressed social issues has been housing. Reflecting the strong interest during the 1970s in "fair share" housing policies that tried to distribute low-income housing throughout entire metropolitan areas, Goal 10 requires that jurisdictions provide "appropriate types and amounts of land . . . necessary and suitable for housing that meets the housing needs of households of all income levels." In an early assertion of its authority, LCDC forbade the small town of Durham in Washington County to shift its entire multifamily zone to single-family. The city of Milwaukie ran into trouble by trying to set more stringent review standards for apartments than for detached houses. In 1982, the small suburban Portland municipality of Happy Valley became a test case when LCDC ordered it to plan for a substantially greater residential density than its residents desired.

Oregon land use planning has been a model for other states in the 1980s and 1990s. Oregonians have been key players in national communication networks on state planning, with staff of the land use advocacy group, *1000 Friends of Oregon* [[web resource](http://www.friends.org/)], playing especially prominent roles. Several aspects of the state system have been especially "exportable." These include its emphases on certainty and timeliness in procedures; its requirement of consistency between local plans and state standards; its use of urban growth boundaries; its emphases on the protection of resource land; and affordable housing.

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**Web Resource:** *1000 Friends of Oregon* (<http://www.friends.org/>).

### *Dolan v. Tigard*

In the 1990s, a key court case that reaffirmed important aspects of private property rights emerged from the small city of Tigard. Many communities throughout the United States have been attaching more and more conditions and requirements when they offer development permissions. Buildings or new subdivisions are often required to pay "systems development charges" to help cover the cost of extending streets and utilities. The City of Portland assesses a transportation fund fee when businesses want to expand—on the theory that a bigger business means more traffic.

In the small city of Tigard, the city linked permission for a plumbing store expansion to the owner donating a portion of the property for a public greenway and contributing to a fund to help build a bike trail at the rear of the property. Florence Dolan, owner of A-Ball plumbing store, argued that there was no connection between her business and the bike trail and that the fee should not be required. The case reached the U.S. Supreme Court, which held in 1994 that Tigard had overstepped the boundaries of acceptable requirements. In essence, said the Court, this sort of exaction had to be related to and proportional to the development in question (one might wonder, for example, how many people would be likely to use their bike to shop for and take home a new sink or water heater). The decision, which had major national as well as local implications, left major exactions (like subdivision system development charges) on the books, but it warned local governments not to overreach themselves.

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**PDF Resource:** *Dolan v. City of Tigard* (Syllabus and Opinions from Cornell University Law School at <http://www.law.cornell.edu/supct/html/93-518.ZS.html>).

### ***Property Rights on the Ballot in the 21<sup>st</sup> Century***

In November 2000, 53 percent of Oregon voters approved Measure 7. This amendment to the state constitution required government compensation for any and all loss of potential property value because of state or local regulations affecting the use of land (making it the nation's most stringent property rights measure). Non-metropolitan areas voted heavily for the measure. It also picked up substantial support in Portland's suburban counties. It can be read both as a reflective of a national trend toward free market values and as an indication of frustration with a planning system with increasingly elaborate sets of regulations. Measure 7 never went into effect because the Oregon Supreme Court overturned the vote on the technical grounds (it simultaneously amended more than one clause of the state constitution).

Because of the court action, and because the legislature was not able to devise an acceptable replacement measure, property rights advocates placed **Measure 37 [pdf resource]** on the ballot in 2004. This time the ballot measure was structured as simple legislation rather than a constitutional amendment (which invites more scrutiny). The measure passed overwhelmingly in November 2004 [**Voting Record: pdf resource**]. It required local governments, on request of a property owner, to waive land use regulations imposed since the most recent transfer of ownership or pay compensation for lost value. Because no locality had a source of funds for compensation, thousands of waivers were granted in the next two years throughout the state. Some were small divisions of family properties or second homes, but others were for massive developments like turning a ranch in the middle of the Grand Ronde Valley of Union County into 1000 ranchettes for Californians, or turning roughly one-third of Hood River County's orchards into view sites.

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**Map Resource:** *Voting Record for Measure 37*. From the Office of the Secretary of State, Oregon.

**PDF Resource:** *Measure 37*. Complete text from the Voters Guide including explanatory text and arguments in favor and in opposition.

**GIS/Map Resource:** *Measure 37 Claims in Oregon*. This dataset provides maps that show the distribution of the thousands of Measure 37 claims that quickly overwhelmed local and county administrative offices the year following its passage. The maps provide a way to approach questions of the impact of the measure – where do the claims cluster and what impacts does that have on cities and rural farmlands? [in process]

**Web Resource:** The Institute of Portland Metropolitan Studies at Portland State University conducted an extensive project documenting Measure 37 claims. The website includes a **Report on the Impact of M37** using selected case studies (<http://www.pdx.edu/ims/m37.html>) and produced a comprehensive **M37 Atlas** that can be downloaded (<http://www.pdx.edu/ims/maps.html>).

**Article Resources:** Below are a few of the many articles that deal with the subject of Oregon's Land Use regulations, public support/opposition, Measure 7 and Measure 37. In addition to the resources

listed above and in the bibliography, these articles provide a wide spectrum of information that can be used to inform classroom lectures, activities and student research.

Knaap, Gerrit J. March 1987. "Self-Interest and Voter Support for Oregon's Land Use Controls." *Journal of the American Planning Association* 53(1): 92-97.

Bassett, Ellen M. 2008. *Framing the Oregon Land Use Debate: An Examination of Oregon Voters' Pamphlets, 1970-2007*. Paper presented at the Association for Collegiate Schools of Planning Conference, Chicago, IL, July 2008.

Fuller, Justin C. 2008. *A Statistical Analysis of Oregon's Land-Use Ballot Initiatives*. Master of Public Policy Thesis, Oregon State University.

Abbott, Carl and Deborah Howe. The politics of land-use law in Oregon Senate Bill 100 twenty years after. *Oregon Historical Quarterly* 94 (Spring 1993):921. Roundtable discussion with Hector MacPherson, Henry Richmond, Stafford Hansel, and Ted Hallock.

Abbott, Carl, Sy Adler and Deborah Howe. 2003. "A Quiet Counterrevolution in Land Use Regulation: The Origins and Impact of Oregon's Measure 7." *Housing Policy Debate* 14(3): 383-425.

Galvan, Sara C. 2005. "Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use." *Yale Law & Policy Review* 23, pp. 587-600.

Blumm, Michael C. and Erik Grafe. 2007. "Enacting Libertarian Property: Oregon's Measure 37 and Its Implications." *Lewis & Clark Law School, Legal Research Paper Series* No. 2007-17.

### ***Oregon's Land Use Planning Post-Measure 37***

Response to the passage of Measure 37 was quick. Proponents of both sides came forward with heated and emotionally-laden arguments. Dorothy English, a property owner in Portland's Northwest Hills, along with Oregonians in Action, took up the banner of fighting for individual property rights [***Oregonian Ad: Graphic Resource***]. 1000 Friends of Oregon took up the challenge of educating the public about the deleterious effects of Measure 37 claims and defending the land use system. The responses also took the form of both legal challenges to the measure as well as numerous studies as to the potential effects, politically, economically and environmentally.

On February 21, 2006, the Oregon Supreme Court issued its opinion in the ***MacPherson vs. DAS*** [**pdf resource**] case reversing a lower court decision in Marion County that had overturned Measure 37. The Supreme Court upheld Measure 37 as constitutional.

In 2007, in response to growing public concern over the effects of Measure 37 claims, Governor Ted Kulongoski introduced ***Senate Bill 505*** [**pdf resource**]. SB505 created an "express line" for Measure 37 claimants that simply wanted to build one additional home on their property while establishing a temporary hold on other largescale claims. SB505 gave the legislature the time needed to develop comprehensive Measure 37 reform while minimizing the negative impacts of inappropriate development from Measure 37 claims.

Following SB505, the legislature placed ***Measure 49*** [**pdf resource**] on the November 2007 ballot to clarify technical and administrative points and to partially limit the applicability of Measure 37. That modification passed with 62 percent of the vote statewide. Opposition was

strongest in southern Oregon from Curry, Coos, and Douglas counties to Harvey and Malheur counties. In contrast, Measure 49 either passed or came within 49 percent positive votes across the middle and northern thirds of the state, with the exception of Sherman and Grant counties.

In effect, the pendulum had swung more to the middle. Voters decided that they wanted to protect “retail” or “family-scale” development rights but not the wholesale transformation of the landscape as was seemingly occurring with the deluge of Measure 37 claims.

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**Graphic Resource:** Dorothy English’s full-page ad in the Oregonian (May 13, 2007).

**PDF Resource:** *MacPherson v. DAS*. A synopsis of the Oregon Supreme Court case which upheld Measure 37 as constitutional.

**PDF Resource:** *Senate Bill 505*, introduced by Governor Kulongoski in 2007.

**PDF Resource:** *Measure 49*. Complete voters pamphlet from the Oregon Office of the Secretary of State including explanatory text and arguments in favor and in opposition.

## 5. Bibliography

Abbott, Carl, Deborah Howe, and Sy Adler, eds. *Planning the Oregon Way: A Twenty Year Evaluation* (Corvallis: Oregon State University Press, 1994).

Abbott, Carl, Deborah Howe, and Sy Adler. 2004. A Quiet Counterrevolution in Land Use Regulation: The Origins and Impact of Oregon’s Measure 7. *Housing Policy Debate* 14(3): 383-425.

Abbott, Carl, Sy Adler, and Margery Post Abbott. *Planning a New West: The Columbia River Gorge National Scenic Area* (Corvallis: Oregon State University Press, 1997).

Bollens, Scott. 1992. State Growth Management: Intergovernmental Frameworks and Policy Objectives. *Journal of the American Planning Association* 58(4): 454-66.

DeGrove, John. *Planning, Policy and Politics: Smart Growth in the States* (Cambridge, MA: Lincoln Institute of Land Policy, 2005).

Gale, Dennis. 1992. Eight State-Sponsored Growth Management Programs: A Comparative Analysis. *Journal of the American Planning Association* 58(4): 425-39.

Judd, Richard, and Christopher Beach. *Natural States: The Environmental Imagination in Maine, Oregon, and the Nation* (Washington: Resources for the Future, 2003)

Knaap, Gerrit, and Arthur C. Nelson. *The Regulated Landscape: Lessons on State Land use Planning from Oregon* (Cambridge, MA: Lincoln Institute of Land Policy, 1992)

Ozawa, Connie, ed. *The Portland Edge: Challenges and Successes in Growing Communities* (Washington: Island Press, 2004).