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Oregon's Ballot Measure 7

by

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I. Preface: Oregon Voters Pass the Nation’s Most Sweeping Compensation Requirement

Many people inside and outside of Oregon did not take Ballot Measure 7 seriously, when it qualified for the statewide ballot in July 2000.¹ After all, during the 1990s, voters in Arizona and Washington had rejected far less radical compensation measures by margins of 60% to 40%, so it seemed very unlikely was it that Measure 7 could pass in Oregon. Oregon had a well-known record of innovation in environmental² and land use regulation.³

Perhaps for that reason, newspapers, radio and television paid little attention to Ballot Measure 7; the state’s largest newspaper, *The Oregonian*, ran only two or three stories on the topic during the entire election season. As a result, there was a great deal of shock when Ballot Measure 7 passed by a margin of 53% to 47%.

In the weeks following passage of Measure 7 state and local governments began scrambling to respond, initial claims were filed and media and public attention soared.⁴

There has been much politically motivated analysis of the content of the measure and the reasons for its passage. But now, eleven months after the election, it is possible to describe Measure 7, as well as its origins and possible future, more objectively.

II. The Content of Measure 7

A. Outline and Summary

Article I, Section 18, of the Oregon Constitution⁵, provides that “private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered...” OR. CONST. Art. I, Sec. 18; Appendix B.

In general, this requirement has been interpreted to parallel the prohibition of uncompensated takings of land found in the Federal constitution. Under Oregon’s Constitution compensation is required when the regulation deprives the landowner of all beneficial economic use. *Fifth Avenue Corporation v. Washington Co.*, 581 P2d 50, 282 Or 591 (1978) and see *Dodd v. Hood River County*, 855 P2d 846, 317 Or. 172 (1993) (no entitlement to compensation when state-mandated forest zoning prohibits construction of a house on property generally suitable for timber production, even as applied to portions of the property that may not be suitable for growing trees.)

¹ The title and summary of the measure printed in the official voters’ pamphlet is reproduced in Appendix C.

² For example, Oregon’s “Bottle Bill” OR. REV. STAT.459A.705 to 459.740; 459.992(3), (4) (1969)

³ See Robert Liberty, *Oregon’s Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States* 22 ENVIRONMENTAL LAW REPORTER10367 (June 1992)

⁴ "Oregon State University political scientist Bill Lunch called Measure 7 the equivalent of 'dropping an atomic bomb' on Oregon's vaunted statewide planning system, because the state cannot afford to pay landowners to follow zoning laws." *Bend Bulletin*, November 8, 2000

⁵ The text of Article I, Section 18 of the Oregon Constitution is reproduced as Appendix B.

Measure 7 was placed on the ballot as a proposed amendment to Article I section 18 of the Oregon Constitution. It is made up of six short paragraphs⁶, with the following subjects:

- (a) The entitlement to compensation
- (b) Exemption for historically recognized nuisances
- (c) Exemption for Federal programs and regulations of nude dancing and the sale of alcohol, controlled substances and pornography
- (d) Restatement and clarification of the entitlement to compensation
- (e) Definitions
- (f) Severability clause

Measure 7 would have amended Article I, Section 18, to require all units of government to pay for any reductions in value to private property caused by their regulations. Measure 7; Appendix A, lines 4-8, 20-23, 28-29. There is no threshold or minimum reduction in value. *Id.* Compensation for reductions in value is required for regulations adopted before Measure 7 was passed. *Id.*

Measure 7 allows for a narrow set of exemptions from the compensation entitlement – for regulations of gambling, nude dancing, the sale of drugs or alcohol, historically recognized forms of nuisance, and the execution of federal laws. Measure 7; Appendix A, lines 14 -23

The measure does not identify any funding source nor does it address various administrative issues, such as a statute of limitation or jurisdiction to hear claims.

B. The Right to Compensation In Paragraphs (a) and (d) of Measure 7

Measure 7 establishes a right state constitutional right to compensation in the single sentence that makes up section (a):

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

Measure 7; Appendix A, lines 4-8.

Additional information about the scope of governmental liability for reductions in value is found in the definitional section, paragraph (e). Compensation must be paid for any "reduction in fair market value" which:

⁶ The text of Measure 7, and the accompanying portions of the Oregon Constitution that it would amend, are reproduced as Appendix A, with the addition of line numbering.

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

Measure 7; Appendix A, lines 28-32.

The right to compensation is reiterated in a slightly different form, and which some procedural elaboration, in subsection (d):

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

Measure 7; Appendix A, lines 20-23.

Paragraphs (a) and (d) raise several important questions:

- What property is covered?
- What governmental actions are subject to the compensation requirements of Measure 7?
- What governmental actions are exempt from Measure 7?
- What are the triggering events for compensation?
- Is the measure retroactive, i.e. does it require compensation for regulations adopted before the passage of Measure 7?

Each of these questions is discussed under separate headings below.

C. Types of Property Covered

Section (e) of Measure 7 defines the type of “real property”, which if reduced in value by government regulation, triggers a right to compensation, to “include any structure built or sited on the property, aggregate and other removable minerals, and any forest product or other crop grown on the property.” Appendix A, lines 25-27. Curiously the measure does not list land in the definition of “real property”, *id.*, but there has been no dispute that land is included in the term “real property.”

D. Types of Regulations Triggering Compensation

Under paragraph (a) Measure 7, applies any regulations adopted by *the state, a political subdivision of the state, or a local government...* which means that there are no units of government exempted from its provisions, except the Federal government. (Federal regulations and regulations executing Federal requirements are exempted expressly under paragraph (c), discussed below.)

Measure 7 defines the regulations falling within its provisions to include: *any law, rule, ordinance, resolution, goal, or other enforceable enactment of government....* Measure 7; Appendix A, lines 24-25.

Obviously within these provisions includes most of Oregon's statewide land use planning statutes⁷ and administrative rules⁸, laws and rules imposing restrictions on forest practices⁹, the framework and functional plans adopted by Metro (the Portland regional government)¹⁰ and any city or county comprehensive plan and zoning regulations.¹¹

But other government acts that appear to trigger compensation under Measure 7 (because they are enforceable acts of government and reduce the value of property) are much less obvious.

On February 13, 2001, Oregon's Attorney General issued a 110-page opinion responding to questions about Measure 7 posed by Governor Kitzhaber. __ OR. ATT'Y GEN. __ (Op. Att'y Gen. No. 8277) (February 13, 2001) (hereafter "Op. Att'y Gen."). As part of that opinion, the Attorney General found the following laws were likely to require compensation¹²:

- Aspects of building codes. Op. Att'y. Gen. At 26
- Landlord tenant laws. Op. Att'y. Gen. at 25
- Prohibitions on building essential facilities in tsunami inundation zones. Op. Att'y. Gen. at 26
- Restrictions on access to public roads. Op. Att'y. Gen. at 26
- A law requiring annexation to a fire district as a condition of subdivision approval. Op. Att'y. Gen. at 27
- Prohibitions on indoor smoking of tobacco in bars or restaurants. Op. Att'y. Gen. at 68
- Industry specific noise regulations. Op. Att'y. Gen. at 27-28
- Oregon's "Bottle Bill" (requires deposit for redemption of certain bottles¹³) Op. Att'y. Gen. at 94-95

On the other hand Measure 7 does not apply to *all* reductions in value caused by passing or enforcing any regulations. For example if a restriction on aggregate mining was lifted on a neighboring property and the value of adjoining property fell significantly as a result, no claim could be made under Measure 7. That is because the measure applies only to *a regulation that restricts the use of private real property*, and the reduction in value takes effect on *a property upon which the restriction is imposed*. Measure 7; Appendix A, lines 5,

⁷ OR. REV. STAT. Chapter 197

⁸ OR. ADMIN. R. 660-000 TO 045.

⁹ OR. REV. STAT. 527.610 to .993

¹⁰ OR. REV. STAT. 268.380 to .390

¹¹ OR. REV. STAT. Chapters 215, 227

¹² The Attorney General opinion did not address the question of whether the opinions and orders issued by courts and administrative tribunals would trigger compensation, although presumably they could since courts are subdivisions of the State of Oregon, whose enforceable opinions and orders reduce property values. However, judicial rulings may not fit qualify as "enactments."

¹³ OR. REV. STAT. 459A.705 to 459.740; 459.992(3), (4)

6-7. In the example, a restriction is removed not imposed and the reduction in value occurred on a neighboring property not the property to which the change in restriction applies.

E. Exemptions

Two paragraphs of Measure 7 provide for exemptions from the broad right to compensation that it confers:

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

(c) A regulating entity may impose, to the minimum extent required, a regulation to implement a requirement of federal law without payment of compensation under this section. Nothing in this 2000 Amendment shall require compensation due to a government regulation prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor.

Measure 7; Appendix A, lines 9-19.

There are many questions associated with these two paragraphs. Two of the most important are: (1) Whether the phrase “historically and commonly recognized nuisance laws” is broad enough exempt pollution control laws and residential zoning laws from the compensation requirement; and (2) How would the Federal law exemption work?

The answer to the first question appears to be “no.” Both zoning and pollution control laws were developed because traditional nuisance doctrines, articulated by the courts, were inadequate to address the broad diffuse effects on the public health and welfare. The result in the 1920s was the adoption of local zoning regulations and in the 1960s the passage of state and Federal pollution control laws.¹⁴ In other words an exemption for “recognized nuisance laws” that are “historical” antedate all

The Oregon Attorney General concurred with this view with respect to traditional zoning and planning: “More generally, and as described above, it is unlikely that subsection (b) extends to laws ...designed to enhance, improve or protect property values including most zoning and land use laws. Op. Att’y Gen. at 68. As for pollution control laws, some water pollution controls fit within traditional nuisance doctrines, but other kinds of pollution

¹⁴ A law journal article from that period illustrates the interaction between the new Federal water quality legislation and old forms of nuisance action “Water Quality Standards in Private Nuisance Actions” 79 Yale L.J. 102 (1969)

control legislation is too recent to qualify as “historically and commonly recognized” including, as least possibly, laws governing solid and hazardous waste disposal. *Id.*

The Federal exemption is a critical issue in Oregon, where the state’s major urban centers are subject to the provisions of the Federal Endangered Species Act’s designation of threatened and endangered salmon, steelhead and trout populations. 65 FEDERAL REGISTER 42422 (No. 132) (July 10, 2000); 64 FEDERAL REGISTER 14308 (No. 56) (March 23, 1999.)

Much discussion regarding the Federal exemption on the process by which Federal agencies would determine whether state or local implementation would be “the minimum extent necessary.” But this analysis puts the question in the wrong context: The answer to the question will not be answered, at least initially by Federal agencies, but by local governments and state courts adjudicating compensation claims filed by property owners contending that state implementation has exceeded Federal minimums.

F. Analyzing the Events Triggering Compensation: Passage, Adoption, First Enforcement and Application of Regulations

The operative subsections of Measure 7, that create the right to compensation, provide (emphasis added):

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

* * * *

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

Measure 7; Appendix A lines 4-8, 20-23.

To recapitulate, Measure 7 creates an entitlement to compensation after any one of three triggering events: 1. A government passes or adopts a “regulation”; 2. A government “first enforces” a “regulation”; and (3) A government applies (possibly “first applies” a “regulation.”) If a property owner acquired the property before any of these acts occurs, and provided the regulation restricts the use of that land, the owner has a right to compensation for any reduction in value.

“Passage” and “enactment” are easily understood terms, but “enforces” and “applies” are not.

One interpretation of “applies” might be the process of putting the regulation into effect in the context of a development application or review proceeding, *e.g.* denying an application to develop a (prohibited) industrial use in a residential zone. Another meaning of

“applied” (also borrowed from the context of land use regulation) might mean extending the geographic reach of applicability of particular regulation. For example, extending residentially zoning onto rural land not previously zoned. In this sense “applied” is actually another form of adoption or passage, with respect to particular property.

The first interpretation of “applied” (of “first applied”) would mean that whenever a regulation was implemented through a permit application review, it could trigger compensation, giving very broad effect to the compensation requirement. The second interpretation of the phrase would give it only slightly wider scope than under the “adopted” triggering event.

However, there is no way of limiting the scope of the phrase “first enforced.” The Attorney General’s opinion, states: “Government enforces a regulation when it acts in any way to give force or effect to the regulation in question by any means other than adopting or passing the regulation.” Op. Att’y Gen. at 4. The government may give effect to a regulation by either taking administrative or judicial action to compel compliance, or simply by approving or denying a land use application. *Id.* at 33, 34.¹⁵

The serious implications of this interpretation of “first enforced” become clear in the following discussion.

G. Retroactivity

Section (a) and (d) (quoted in subsection F., above) both entitle a property owner to compensation for reductions in value caused by government restrictions that antedate their ownership. Neither those provisions nor any other part of Measure 7 limits compensation to “regulations” adopted after Measure 7 becomes effective. The Attorney General concluded: “There is nothing in the text or context of Measure 7 to suggest that it does not include the right to compensation for the future enforcement of regulations adopted before Measure 7’s effective date, as well as new ones. Op. Att’y Gen. at 35.

Some of the state’s larger timber companies, such as Weyehaueser, have been in existence for more than 100 years, then certainly those companies would be entitled to compensation for almost all, or all, state and local regulations that have ever been enacted.

However, it is possible that Measure 7 creates a right to compensation for people who acquired property *after* a regulation was adopted and applied to that property, because of the meaning of “first enforced.”

To illustrate, suppose that a property owner acquired property in 1970 that was zoned residential in 1951. In 2002 the property owner applies for permission to build a fast food outlet under a zoning code provision allowing variances from use limitations. The local government determines that the standards for the variances are not applicable and that because fast food outlets are specifically prohibited in that zone the application is denied.

¹⁵ The Attorney General also concluded, albeit with some hesitation, that if government attempted to enforce a regulation with respect to any particular property, it would create a right to compensation for any other property owner whose land was subject to the same regulation, even if that regulation was not enforced against that property owner. *Id.* at 35.

There are at least three arguments the owner can make to claim compensation under Measure 7.

First, the property owner conducts research in the local government files and determines that the particular variance provision has never been applied to deny a development permit to any property owner. Therefore, this is the first time that regulation has been enforced and this first enforcement comes after he bought the property. Because his land would be worth more as a fast food outlet and therefore he is entitled to compensation.

Second, no one has ever applied for permission to build a fast food outlet in the residential zone and therefore this is the first enforcement of that specific prohibition. He has owned the property before this first enforcement and because this enforcement has reduced the value of his property, he is entitled to compensation.

Third, even if he discovered that the regulation has been first enforced or applied to *another* applicant in the same zoning district who was denied permission to build a fast food outlet, it has never been enforced or applied to *his* property. Under this interpretive approach, virtually all landowners could make claims for compensation for any regulation, regardless of when they acquired their property. Any subsequent purchaser might be able to make the same claim.

H. Waiver or Nonenforcement of State and Local Laws and Regulations to Escape Liability

After Measure 7 passed (and before it was enjoined) scores of local governments began adopting ordinances giving themselves the authority to waive or not enforce various land use planning regulations, including local plans and regulations adopted to carry out state land use laws, in order to escape liability under Measure 7. See e.g. John Sowell, *Measure 7 ordinance gets county OK*, News-Review (Roseburg, Oregon) December 7, 2000 1, 3. Many of those ordinances were appealed by organizations committed to the enforcement of those laws. See e.g. *Officials caught in Measure 7, quandary* Gresham Outlook (January 3, 2001).

This local government waiver theory was raised and rejected by a trial court in the context of a challenge to the constitutionality of Measure 7, discussed below in Section IV.¹⁶

¹⁶ Local governments adopted these waiver provisions claiming they were given the authority to waive these provisions under section (d) of Measure 7:

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

However the most logical reading of these provisions is simply that it gives local governments a grace period of 90 days in which they can repeal their own regulations or grant some kind of authorized variance: It does not confer any additional power to waive regulations implementing mandatory state laws.

Because similar questions arose regarding state agencies ability to avoid or reduce their own liability for claims, this became one of the questions posed to the Attorney General for discussion as part of a formal opinion. The Attorney General’s conclusion was surprising:

To summarize our analysis of appropriations, allotments and the debt limitation, we conclude that if an agency’s enabling statutes or rules do not give the agency discretion to forego enforcement of a regulation restricting the use of private real property, an agency must enforce that regulation as long as it has money within its appropriation and allotments to pay valid Measure 7 claims.... In no event, however, may the agency incur obligations in excess of its appropriation or allotment; at that point, the agency would no longer be required to perform its mandatory statutory duties. If the obligation to pay a Measure 7 would result in a debt limit violation, not only may the agency no longer enforce the regulation giving rise to the claim, but the regulation would no longer apply; it would cease to have legal force or effect.

Op. Att’y Gen. 55.

III. Estimated Fiscal Impacts of Measure 7

A. Official State Fiscal Impact

As required by state law, OR. REV. STAT. 250.125, the Oregon Secretary of State prepared a financial impact statement for Measure 7 published in the official voters’ pamphlet.

ESTIMATE OF FINANCIAL IMPACT: Direct costs to the state are estimated to be \$1.6 billion per year. Local government direct costs are estimated to be \$3.8 billion per year. There is no state or local government revenue impact.

“voters’ pamphlet: Vote By Mail General Election, November 7, 2000”, volume 1 at page 309.¹⁷

¹⁷ The state and local cost estimates were derived by extrapolation from the cost estimate prepared for the 1994 Washington State initiative by the University of Washington.

B. Oregonians In Action’s Fiscal Impact Estimate

The supporters of Measure 7 did not prepare their own cost estimate. However, in published newspaper accounts they estimated the annual cost to be \$50 to \$100 million. *e.g.* Karen Mockler, *Measure 7 opponents brace for expensive storm* Daily Astorian, November 9, 2000 at 1.

C. ECONorthwest Fiscal Impact Study of Selected Regulations

During the campaign the economic and planning consulting firm of ECONorthwest prepared a cost estimate of Measure 7, as applied to a few sample state and local land use laws and regulations. ECONorthwest, *Fiscal Impacts of Ballot Measure 7 on State and Local Governments: An Analysis of Selected Regulations* (October 2000, John Tapogna, Lead Researcher) (hereafter “ECONW Fiscal Impacts.”). The firm provided an estimate for a sample of local zoning changes, including restrictions on cell towers as well as state laws regulating forest practices, mandating public beaches, and administrative rules requiring urban growth boundaries (“UGB”s) around all cities and limiting the density of rural subdivisions.

Table 1 from that report provided a summary of the estimated claims, based on two different possible interpretations of the retroactivity provisions of Measure 7. The first estimate assumes that compensation is due only if the property owner’s interest in the property antedated the adoption of the regulation (“partial retroactivity”) and the second assumed all properties could be compensated for all regulations regardless of when they bought their property (“full retroactivity;” see discussion above in section II.G):

Table 1: Estimated Claims for Selected Regulations and Jurisdictions

	Estimated Claims Assuming <i>Partial</i> Retroactivity	Estimated Claims Assuming <i>Full</i> Retroactivity
Recent Municipal Zoning¹		
Southwest Portland Neighborhood Plan	\$8,296,376	\$8,296,376
North Salem Downtown Plan	\$2,700,108	\$2,700,108
Salem Cell Tower Restrictions	\$9,910,678	\$9,910,678
Public Beach Access	\$15,634,080	\$78,170,400
Oregon Forest Practices Act	\$916,700,000	not estimated
Urban Growth Boundaries (lost urbanization)		
Portland	\$3,493,077,379	\$6,986,154,757
Salem-Albany-Corvallis	\$2,132,120,595	\$4,264,241,190
Eugene-Springfield	\$1,567,884,547	\$3,135,769,093

Bend	\$535,084,821	\$1,070,169,642
Rural Subdivision Restrictions¹	\$56,737,500	\$56,737,500

ECONW Fiscal Impacts vi.

The Salem cell tower analysis raised the issue of whether courts would examine claims in isolation or take into account “demand constraints.” The phrase “demand constraints” refers to the economic reality that only a few landowners will actually be able to take advantage of certain development opportunities because market demand would not support an unlimited number of uses. For example even though any one land owner might be able to claim a lost opportunity to build a cell tower, in fact only a small number of cell tower sites are actually needed.

ECONorthwest requested an opinion from a condemnation lawyer on this issue that concluded that every case would be considered in isolation and therefore demand constraints would not be use to reduce potential compensation. *Id.* at 14, 21, Appendix B.¹⁸ In other words, in Salem only 26 towers would be needed but 30,000 property owners’ land would be subject to the restrictions. All 30,000 property owners would be entitled to claim a loss of \$100,000 (the net present value of the cell tower lease payments) which would generate combined maximum claims of \$3 billion. ECONW Fiscal Impacts at 21. ECONorthwest chose not to display that number in the table they produced. Rather the liability was based on an estimate of the number of claims that would be filed, 100, rather than potential liability. *Id.*

IV. Challenges to the Constitutionality of Measure 7

Within weeks of the passage of Measure 7, opponents of the Measure mounted a challenge to its constitutionality. Audrey McCall, widow of former Governor Tom McCall (who spearheaded passage of Oregon’s 1973 land use planning organic act, Senate Bill 100), former State Senator Hector Macpherson (a co-sponsor Senate Bill 100), the mayor of Salem and three other plaintiffs filed suit against the state of Oregon, Governor Kitzhaber and Secretary of State Bradbury in Marion County Circuit Court in Salem. *McCall v. Kitzhaber*, Marion County TC No. 00C-19871 (filed November 24, 2000.) They were represented by Thomas Christ of Portland, who had successfully challenged other ballot measures on constitutional grounds, *id.* most notably in *Armatta v. Kitzhaber*, 959 P2d 49, 327 Or 250 (1998).

The League of Oregon Cities and various individual cities filed their own appeal shortly thereafter. *League of Oregon Cities v. State of Oregon*, Marion County TC No. 00C-20156. Stuart Miller, the original petitioner for Measure 7, intervened on the side of the state.

¹⁸ Nonetheless, as Table 1 shows, ECONorthwest did in fact decline to show the resulting full liability for cell tower restrictions on all 30,000 properties under this interpretation, which would be about \$3 billion..

On December 7, 2000 Marion County Circuit Court Judge Paul Lipscomb found that the plaintiffs were likely to prevail on the merits and that substantial harm would result if the measure was not enjoined. Lipscomb issued an injunction against Governor Kitzhaber and Secretary of State Bradbury preventing them from certifying the results of the election and thereby prevented Measure 7 from going into effect. *McCall et. al v. Kitzhaber et al*, Marion County TC No. 00C-20516 (Opinion of the Court On Plaintiffs' Motions For Preliminary Injunction, December 6, 2001)

In his suit Christ alleged that Measure 7 violated several aspects of Oregon's Constitution governing the method for its amendment:

- Article IV subsection 1(2)(d) of the Oregon Constitution requires initiative petitions to include the full text of the proposed amendment. Ballot Measure 7 failed to show the voters the existing provisions in Article I, Section 18 requiring compensation and therefore failed to present the full text. *McCall v. Kitzhaber*, Marion County TC No. 00C-19871 (McCall Plaintiffs' Summary Judgment Brief, filed January 19, 2001) at 2-10
- Article XVII Section 1 of the Oregon Constitution requires voters to vote on multiple subjects in a single measure, when each amendment must be voted on separately. Measure 7 effectively amended several sections of the state Constitution in one measure. *Id.* at 10-11
- Article XVII, section 2 of the Oregon Constitution requires "revisions" (i.e. major changes) to the state constitution to be approved first by a two-thirds majority of both houses of the Legislature before being referred to the voters. Because Measure 7 had been read to allow local governments to waive or override state laws, it altered the fundamental balance of powers between the state and local governments, and was, therefore a revision. *Id.* at 12-13.

After a trial on the merits, Lipscomb issued a final opinion on February 22, 2001. *McCall v. Kitzhaber*, Marion County TC No. 00C-20516 (February 22, 2001) (Hereinafter "Lipscomb Opinion".)

In his opinion, Judge Lipscomb stated":*[T]his court acknowledged that enjoining the implementation of an Initiative Measure was a grave and serious step. On the other hand, amending the Constitution is not a trifling matter either. The procedures for amending the Oregon Constitution through the initiative process are strict, and the constitution itself demands that those standards are followed...* Lipscomb Opinion at 3.

Judge Lipscomb ruled that the changes in Measure 7 were presented to voters out of context. The measure should have been presented to voters along with the existing parts of the Constitution that it would modify, including protections that already require compensation when government takes private property for public use.

In this regard Judge Lipscomb found that *Ballot Measure 7 not only adds new provisions to Section 18 or Article 1, but it also changes the substance and the meaning of*

the existing provisions of Section 18 without giving any notice to the voters of those direct and substantive changes. Lipscomb Opinion at 11.

Judge Lipscomb also concluded that Measure 7 contained multiple amendments to the Oregon Constitution. The Constitution requires that voters be allowed to vote separately on each amendment, because they may have different opinions on each amendment.: *...several of the provisions of Ballot Measure 7 do not appear to be "closely related" in that a voter's support of one provision does not necessarily imply support for any of the others. Many voters might vote for any one of these individual provisions, and some might choose to vote for all of them. But no one of these provisions necessarily implies support for any of the others.* Lipscomb Opinion at 23.

After his ruling Judge Lipscomb issued a permanent injunction against Kitzhaber and Bradbury.

Lipscomb's ruling was appealed to the Oregon Court of Appeals. CA No. 113789 In response to motions, the Court of Appeals certified the matter to the Oregon Supreme Court. *McCall et al. v. Kitzhaber*, ___ P2d. ___, __ Or. App. _ (2001). (Oregon Supreme Court Docket Number S48451.) Oral argument was held on September 10, 200.

In addition to the arguments raised by Audrey McCall et al, the Supreme Court also examined the standing of the parties, the justiciability of a measure after it had passed but before it was implemented . Brief of Respondent McCall et. al, *McCall v. Kitzhaber*, ___ P2d ___; ___ Or. ___, (Oregon Supreme Court Docket Number S48451) at 10-29.

Oral argument indicated that several justices take the issue of revision versus amendment seriously. Of particular interest to Justice Gillette was a comment made by the attorney for the various cities, William Gary, to the effect that Measure 7 had revised the constitution by collapsing the police power into eminent domain; the only way to regulate was by payment.

A ruling is anticipated sometime in 2002.

V. Effort at Legislative Compromise in 2001 Session

A. Legislative Context

Governor John Kitzhaber (a Democrat) opposed Measure 7 and supported efforts in the 2001 Legislature to replace it with something more reasonable. In public statements, the Governor expressed his opposition to weakening the state's land use planning or environmental laws and took that position that any money to pay landowners must come out of a new funding source, not out of existing budgets, given the state's serious budget shortfall. Hearings Before the Land Use and Regulatory Fairness Committee of the 2001 Oregon Legislative Assembly, Testimony of John Kitzhaber, March 15, 2001.

Republican Senate President Gene Derfler indicated that he had little interest in tackling Measure 7 but would not resist the development of a solution. Dave Hogan, *Sorting out Measure 7 will take some time* The Oregonian (January 1, 2001) at A1, A8.

House Speaker Mark Simmons, a Republican from rural northeastern Oregon, issued a Statement of Principles: "Recognizing that Oregonians have consistently supported a

comprehensive land use system the focus of [the response to Measure 7] is not to overhaul the current land use system."

Speaker Simmons created a special committee to discuss, and if possible craft, a replacement measure for Measure 7. The Committee, the Land Use and Regulatory Fairness Committee, had seven members, four Republicans and three Democrats. The Chairman was Rep. Max Williams of Tigard, a Portland suburb. The Vice Chair was Democrat Kurt Schrader, a veterinarian and farmer from rural Clackamas County. Peter Wong, *Lawmakers ponder next step*, (Salem) Statesman Journal (February 23, 2001)

After long, private, consultation with the supporters of Measure 7, Oregonians in Action, as well as the Oregon Building Industry Association (which was neutral on Measure 7), the League of Oregon Cities and others, Rep. Williams developed a four-part framework for response to Measure 7. Three of the parts would be statutes, contingent on voters approving a Constitutional revision that replaces Measure 7. The topics of the three statutory elements are (1) limited payments for past regulations on rural lands; (2) protections and relief in the form of payments or other benefits for prospective regulations; and (3) funding. The statutory part of the framework was given legislative form in Oregon House Bill 3998 (hereafter "HB 3998") introduced in late May.

Ultimately there were almost twenty versions of House Bill 3998 prepared by Legislative Counsel and it reached a length of 48 pages. But despite all the drafting work it was the subject of only two committee hearings, before it died in committee at the end of the Legislative session, on July 7, 2001.

The following subsection sketches out some of the chief components of various versions of HB 3998.

B. Overview of House Bill 3998 and Related Constitutional Revision

Unlike Measure 7, the scope HB 3998¹⁹ would have applied only to land use regulations and only to land use regulations adopted at the state and local level. It would not apply to laws and regulations governing air, water and land pollution, health and safety regulations and it does not apply to any other units of government other than cities, counties, Metro (the regional government in the Portland metropolitan area) and the state.

HB 3998 would only go into effect upon passage of a Constitutional revision of the Oregon Constitution that would replace Measure 7. The provisions of the proposed revision are described below.

The retrospective provisions of the bill were limited to an arrangement for payments to the owners of rural land (in Oregon, this has a precise meaning, i.e. the land outside the urban growth boundaries that surround every city.) Here were the key elements:

- Payments would be the only form of relief - no waivers; i.e. no new houses or land divisions would be allowed. Section 3

¹⁹ This description of House Bill 3998, is based on the sixteenth version (HB 3998-16), which was published July 2, 2001.

- Payments would have been limited to owners of land in farm, forest and rural residential zones. Only those landowners who purchased their land before the date when subsequent laws and rules prohibited the construction of a house or division of the land. Each claimant would have been entitled to compensation for up to ten houses and ten land divisions. Section 3
- Claims for up to ten houses would be paid first, then payments would be made for up to ten land divisions. Within each priority, payments are made based on the date of acquisition. Section 4
- Payments to landowners could be made in cash or take the form of a transferable development credit Section 5
- Compensation would be limited to the funds appropriated; the legislation would not create a right to compensation and the state would not assume a liability for paying all claims. Section 5
- In exchange for a payment, a conservation easement would be placed on the land that prohibits future houses or land divisions (depending on the claim.) Section 9
- The deadline for filing claims would have been December 31, 2004, Section 6, and the retrospective provisions would be repealed in 2007. Section 11
- The legislation would be effective only upon passage of an accompanying Constitutional revision that repeals Measure 7 and a funding source. Section 33

Here is a summary of the key elements of the so-called “prospective” provisions, *i.e.* the provisions that would have applied to laws and regulations adopted after the effective date of the legislation.

- When any single regulation, or when a reinterpretation of an existing regulation, reduced the value of a property by 25% or more, the owner of that property would be entitled to compensation equal to 100% of the reduction in value, including the first 25%. This percentage (and related entitlements) would sunset in 2005. Section 12
- When multiple regulations reduced the value of a property by 45% or more within a specified period (3 or 5 years, the owner of that property would be entitled to compensation equal to 100% of the reduction in value, including the first 45%. This percentage (and related entitlements) would sunset in 2005, to be followed by legislative consideration of retaining or modifying the percentage. Section 12
- Some regulations would be exempted from this prospective compensation requirement including regulations implementing Federal mandates (e.g. Endangered Species Act), regulations carrying out laws that pre-date the bill. New rules

implementing the statewide planning laws and goals would be, with minor exceptions, *not* exempted. Section 12

- The payment for the reduction in value would be netted against increases in value caused by changes to land use regulations (e.g. up-zoning) and infrastructure investments, over some limited period. Section 12
- Compensation would take many forms; cash, transferable development credits, tax abatements, or variances. Section 14
- There would be brief time periods for making claims once regulations are adopted. Section 15
- There would be a complex process for making and reviewing claims, appraising properties and hearing appeals. Sections 16, 17, 18, 19, 20
- These provisions would go into effect only if the voters approve a Constitutional revision that replaces Measure 7 and a funding source. Section 33

The two funding sources seriously considered by the committee were (1) A tax on the increase in value that follows the approval of zone changes and land divisions; (2) A reduction of the 3% early payment bonus for property taxpayers. The money (\$25 to \$50 million per year) would be used to pay for retrospective and prospective compensation and for infrastructure. The proportions of the funds would vary over time.

The Constitutional revision that would be a precondition for the implementation of HB 3998 was never introduced in bill form (as a House Joint Resolution) and only existed as a draft by Legislative Counsel (LC 4258-1). Here were the key elements of the draft:

- A statement of principle about fairness to landowners
- A statement or principle endorsing Oregon's land use planning laws.
- Require a two-thirds majority in the Legislature to change the threshold number (25% in the draft bill) beyond which new regulations require payment.
- Repeal Measure 7.

V. Future Prospects

Several measures that would have the effect of repealing, nullifying or replacing Measure 7 with something much narrower are expected to be filed before the end of 2001. As of the date of writing supporters of Measure 7 have not filed any measures to enact another, similar but narrower version of Measure 7.

Future initiative action will probably depend greatly on both the Supreme Court's ruling and estimates about popular responses to future measures.

Public opinion research shows that voters simply did not believe that passage of Measure 7 would result in roll-backs or waivers of state land use and environmental laws or

local zoning. The same polling also shows that the voters did not regard this as a serious or fundamental issue and many of them can barely recall it today.

In the absence of the passage of another measure by the voters at the 2002 general election, it is likely the 2003 Legislature will return to the task of trying to find some other, more moderate means of addressing voters' concerns about fairness to property owners.

APPENDIX A
Text of Ballot Measure 7

1 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON:
2 THE CONSTITUTION OF THE STATE OF OREGON IS AMENDED BY
3 ADDING THE FOLLOWING SUBSECTIONS TO SECTION 18 OF ARTICLE I:

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

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

14 (c) A regulating entity may impose, to the minimum extent required, a regulation to
15 implement a requirement of federal law without payment of compensation under this
16 section. Nothing in this 2000 Amendment shall require compensation due to a
17 government regulation prohibiting the use of a property for the purpose of selling
18 pornography, performing nude dancing, selling alcoholic beverages or other
19 controlled substances, or operating a casino or gaming parlor.

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

24 (e) Definitions: For purposes of this section, "regulation" shall include any law, rule,
25 ordinance, resolution, goal, or other enforceable enactment of government; "real
26 property" shall include any structure built or sited on the property, aggregate and
27 other removable minerals, and any forest product or other crop grown on the property;
28 "reduction in the fair market value" shall mean the difference in the fair market value
29 of the property before and after application of the regulation, and shall include the net
30 cost to the landowner of an affirmative obligation to protect, provide, or preserve
31 wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical,
32 archaeological or cultural resources, or low income housing; and "just compensation"
33 shall include, if a claim for compensation is denied or not fully paid within 90 days of
34 filing, reasonable attorney fees and expenses necessary to collect the compensation.

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

APPENDIX B
Oregon Constitution Article I, Section 18

Section 18. Private property or services taken for public use. Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

APPENDIX C
Ballot Title and Summary of Ballot Measure 7

AMENDS CONSTITUTION: REQUIRES PAYMENT TO LANDOWNER IF GOVERNMENT REGULATION REDUCES PROPERTY VALUE

RESULT OF "YES" VOTE: "Yes" vote requires state, local government pay property owner if law, regulation reduces property value.

RESULT OF "NO" VOTE: "No" vote rejects requiring government pay compensation if law or regulation reduces property value.

SUMMARY: Amends Constitution. Oregon Constitution prohibits taking private property for public use without just compensation. Oregon Supreme Court has not required compensation when property value merely reduced. Measure requires state; local governments pay landowner amount of reduction in market value if law, regulation reduces property value. Compensation required if owner must act to protect certain natural resource, cultural values or low income housing. Exemption for historically recognized nuisance laws or if owner sells alcohol, pornography, operates casino. Applies if regulation adopted after owner acquires property.