



An Introduction to Oregon's Future's Measure 7 Forum

The pieces contained in this volume of *Oregon's Future*, while focused primarily on the import of Oregon's Measure 7, demonstrate the central controversy that historically surrounds the concept of property in American democracy.

The idea that property is important to democracy is uniquely American. The constitutional and statutory protections provided for property within our legal system have not been duplicated in any of the other industrial democracies that have flourished over the last 200 years. At the formation of our republic in the 1770s and 1780s, even the most ardent democrats such as Thomas Paine and Thomas Jefferson saw private property as a means for the salvation of a free people. Jefferson's reasoning was representative of the time: individuals who possessed private property would be independent of the vicissitudes of wage labor; if the only thing one could sell was one's labor, one was not truly free. This is the logic of Jefferson's "yeoman republic," which, though eclipsed by the emergence of a robust manufacturing and commercial economy, has remained

part of the American creed.

Our nation's founders went to great lengths to protect the concept of private property from becoming meaningless in light of potential future abuses of state power—hence, the Fifth Amendment, which prohibits the state from taking property without compensation. Nevertheless, the founding generation of American leaders were anything but timid when it came to exercising state power at the expense of private property. Private property often became a casualty to the construction of public goods and projects designed to prevent public harms.

In the early 1800s the city of Baltimore, in a public works pro-

ject, filled in with debris a portion of the bay in front of a private party's wharf. The U.S. Supreme Court was unsympathetic to a Fifth Amendment takings claim brought by the wharf's owner, arguing that the amendment only applied to the federal government; this implies that the public good resulting from this exercise of delegated power by the city far outweighed any harm to a single individual's private property (*Barron v. Baltimore*[1833]). In fact, such exercises of governmental power were common practice in the United States at both the federal and state levels until *Pennsylvania Coal Co. v. Mahon* in 1922. At this time,

Private Property and the Puzzle of Takings

By
John Tapogna and
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as Cornelia Griffin Farmer points out in her essay, "An Historical/Legal Perspective on Takings," the *modern* understanding of the takings clause then started to materialize.

Until fairly recently in our country's history, we had a much different conception of the significance and inviolability of private property than we do today. In effect, our political culture, politicians and judiciary, though dedicated to the promotion and expansion of private property (even through government subsidies, land grants, and Homestead Acts beginning in the 1840s), tended to subordinate private property to conceptions of the "common good" when the two came in conflict—even if that meant taking from small landowners to give to large corporate interests. In short, we tended to subordinate the Takings clause to the Police Powers and Reserved Powers clause of the 10th Amendment.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON:

In one sense, the controversy addressed in this issue's forum demonstrates this historical shift. All parties agree that the government must compensate when it physically invades one's private property. Yet, when governments create rules and regulations that diminish the real or speculative value of property or its uses, there is little consensus. Randy Tucker's piece reflects the same notion that guided the bulk of decisions made in American history in politics and law—that protection of private property is no excuse for ignoring the duties of government. Why should the takings clause be read to require compensation to individuals for the prevention of public harms? Why should the right to pollute be part of that bundle of sticks we call property rights? Larry George, on the other hand, suggests that fairness requires property owners to be compensated when regulatory action achieves public purposes at private citizens' expenses. Both sides agree in their respective calls for "fairness."

when voluntary compliance to laws is maximized, and coercive compliance is minimized. One way democracies do this is by involving people in the governing process, perhaps as legislators or voters. If people "create" the laws and subsequent policies themselves, they are more likely to understand their utility and more likely to consider them legitimate. This is, in part, the rationale of Oregon's initiative system. The other way democracies minimize coercive compliance is by paying heed, implicitly or explicitly, to fairness concerns. For instance, while most of us do not participate in the creation of traffic laws, most of us obey stop signs and traffic lights because we feel they are fair: stop signs and traffic lights ostensibly apply to everyone, and we understand that our own personal freedom—and the personal freedom of others—to drive any speed we wish must be sacrificed for the safety of all. In short, we seek uniform and non-arbitrary application, believing that the personal and com-

The trick to a sound and fair compensation system will lay in finding the winners, persuading them they have won, and getting them to pay.

Fairness is an odd term, and, in most citizens' minds, very subjective. Doesn't "what's fair" benefit most the party claiming unfairness? Despite this flexibility in meaning, fairness, or its synonym, justice, is critical for democratic societies. Democratic societies are premised on the belief that the common good and the happiness of individuals are best achieved

mon benefit gained is proportionate to the personal sacrifice required. Our consensus on the importance of fairness is evident every time a car halts at a stop sign or traffic light without the presence of a police officer, demonstrating the wonder and delicate balance of democracy.

As the separate pieces by Randy Tucker, Larry George, and Ed Whitelaw point out,

The Constitution of the State of Oregon Is Amended by Adding the Following Subsections to Section 18 of Article 1:

(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.

(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.

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(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.

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

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

Official 2000 General Election Voter's Pamphlet, page 309.

fairness has been a central concern of Oregon land use regulation since its origins. In the immediate aftermath of SB100 in 1973, as George points out, the Oregon Legislature did consider compensation concerns. Still, that legislature saw fairness as a two-way street: government regulation could create both "windfalls" and "wipeouts." Eventually, legislative hearings regarding compensation ended when legislators could not agree on how to capture the "windfalls" to pay for the "wipeouts." At that time, legislative hearings hypothesized that value created or enhanced by SB100 far outweighed any declines in value. Such a "total accounting" of regulatory effects is not present in Measure 7, and thus is part of the reason why opponents of Measure 7 say that its "just compensation" is anything but just.

With the passage of Measure 7, Oregon voters reopened that 28-year old debate, leaving advocates on all

impacts, and governments' abilities to waive regulations.

The future of Measure 7 is unclear. Supporters are appealing Judge Lipscomb's ruling and, if successful, could revive Measure 7 in its original form. Meanwhile, a House Committee, headed by Tigard Republican Max Williams, is considering alternatives to the measure. As of this writing, the Oregon Senate appears less eager to join the debate.

Each of the essays in the forum alludes to some type of compensation system in Oregon's future. Larry George and John Charles would be pleased with Measure 7 in its current form. Ed Whitelaw and his associates see the need for compensation, but believe Measure 7 is unworkable. Randy Tucker, the strongest critic of the measure, has nonetheless outlined a set of principles that he would use to judge alternative compensation systems.

It seems a safe bet, given the voters' deep respect for the initiative process, that

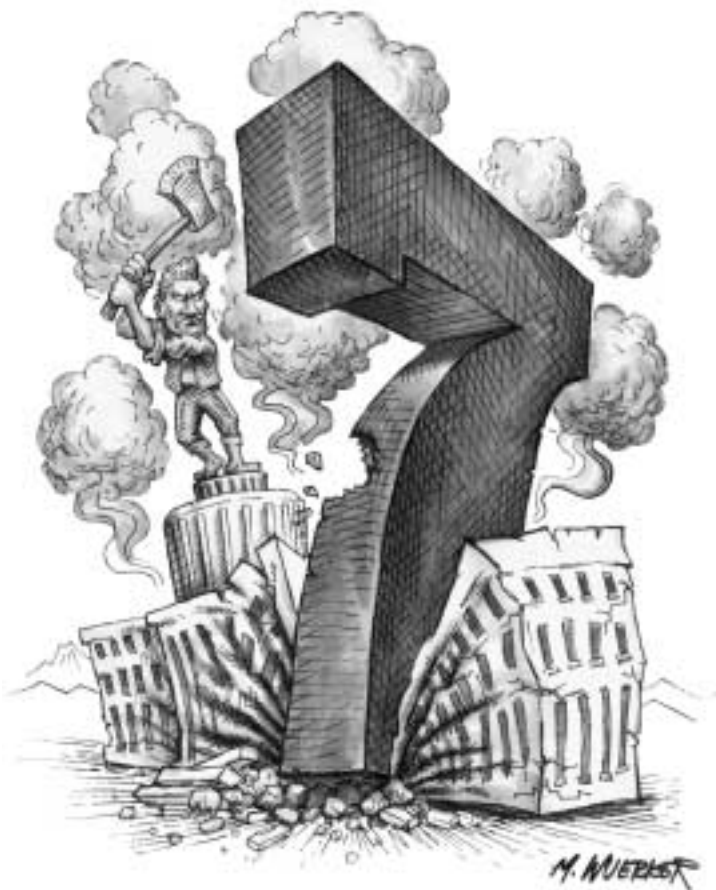
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sides to anticipate what voters sought in passing the measure. Post-election focus groups suggest that many voters believe that property owners should get more compensation from government when government's regulations reduce their property values. But voters did not consider many of the details that are now occupying the time of lawmakers, attorneys, and public-sector employees—retroactivity, fiscal

Oregonians will address the regulatory takings issue in some form during the next few years. If the courts or the legislature fail to act, property rights advocates will. Whoever picks up the debate will have a lot of questions to answer. Here are a few for starters:

Who Pays?

As lawmakers recognized in 1973, land use regulations create



both winners and losers—ideally, many more winners than losers. Having the winners share their windfalls is certainly fair, but this is easier said than done. As Tucker notes, Measure 7 covers an array of rules and regulations, the scope of whose effects varies widely. Some rules—like traditional residential zoning—create benefits and costs at the neighborhood level. Others, like rural development restrictions that operationalize the urban growth boundaries, extend benefits to everyone in a metropolitan area. And one could argue that still others—like bans on clear-cutting—benefit all Oregonians. The trick to a sound and fair compensation system will lay in finding the winners, persuading them they have won, and getting them to pay.

How Do the Winners Pay?

Assuming we can identify the winners, we then have to

consider how they would share their windfalls with the losers. Given Measure 7's emphasis on property, a logical candidate would be a property tax increase in areas that enjoy net benefits from government regulations. But Oregon's ability to increase property taxes is constitutionally limited by Measure 5. That leaves income taxes, franchise fees, and user fees as second-best alternatives. The less clear the nexus between the tax and its purpose, though, the less likely people will be willing to pay it.

How Far Back Do We Go?

State and local governments have been in the land use zoning business since the beginning of this century—although the action picked up considerably in the 1970s and thereafter. Throughout the last century, rules and regulations created windfalls and wipeouts with the blessing of the courts. To some degree, Measure

7 attempts to address the past inequities by allowing people to make a claim for compensation if they purchased property before a regulation was effective. For example, rural landowners who purchased properties in the 1960s could file a claim associated with rural development restrictions enacted in the 1970s. Oregonians will have to consider whether such a policy would be fair and workable. For example, if a compensation policy significantly increased the supply of rural lands available for development—through the lifting of regulations—the value of already developed urban lands would fall, and recent urban home buyers would lose. Would that not also be takings of sorts?

How Low Do You Go?

Measure 7 is unique from other state-level compensation systems in that it sets no minimum value for a claim. On this point, Farmer recalls the opinion of former Supreme Court Justice Oliver Wendell Holmes who said “government hardly could go on” if it had to compensate every case of diminished value. In considering compensation, Oregonians have to decide whether Measure 7's zero threshold is appropriate, and if not, what is.

As Farmer points out, Measure 7 is truly revolutionary. All our authors agree that adopting something like it would have a long-term impact on Oregon's economic and environmental landscapes. The five essays in this volume provide valuable insights and perspectives on this property rights issue and should shed light on this very important debate.



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