MP 00/141

A G E N D A

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METRO

Agenda

MEETING:	METRO COUNCIL/EXECUTIVE OFFICER INFORMAL MEETING
DATE:	November 14, 2000
DAY:	Tuesday
TIME:	2:00 PM
PLACE:	Council Annex

CALL TO ORDER AND ROLL CALL

I.	**UPCOMING METRO LEGISLATION**	
II.	**GOAL 5 INVENTORY**	Ketcham
III.	**PERIODIC REVIEW PHASE 2** • **Time Line and Work Plan**	Cotugno
IV.	**OCC UPDATE**	Cooper
V.	**BALLOT MEASURE IMPACTS**	Cooper
VI.	**EXECUTIVE OFFICER COMMUNICATION**	
VII.	**COUNCILOR COMMUNICATIONS**	

ADJOURN

TO: GOAL 5 Technical Advisory Committee

FROM: PAUL KETCHAM, METRO

RE: Enhanced Goal 5 Inventory

DATE: October 20, 2000

Introduction

Based on comments from several Goal 5 members as well as my own understanding of the revised State Goal 5 rule, we have been looking at ways to enhance the basic inventory for our Goal 5 Streamside CPR program. Accordingly, this memo outlines our approach to an improved inventory - the foundation for any regional program to address fish and wildlife habitat.

To this end, we are presenting our draft methodology to the Goal 5 TAC. We have elected to start with a pilot project using Rock Creek (the one in Clackamas County), a tributary of the Clackamas River. We are seeking your thoughts and comments about the efficacy of our method before we apply it to the whole area within the Metro jurisdictional boundary.

At a later time we plan to use the selected methodology to evaluate the lands within a specified distance outside of the Metro boundary. Doing so will help analyze areas under consideration for expansion of the Metro urban growth boundary and help ensure coordination with natural area plans by the Metro Greenspaces Program.

The purpose of this memo is to describe how we plan to collect, synthesize, and organize data in order to enhance our inventory and ensure compliance with State Goal 5. I look forward to any comments you may have.

Goals of our inventory enhancements:

1. Comply with statewide planning goals, especially Goal 5;
2. Establish baseline conditions and monitor changes over time;
3. Provide a foundation for a Goal 5 protection program, including restoration opportunities;
4. Support program evaluation and assessment.

Proposed methodology for Metro's enhanced Goal 5 Inventory:

This project will build on the existing Goal 5 GIS Inventory of streams, floodplains, wetlands, and slopes and will utilize remotely sensed data to create new data items. The new data will include information on vegetative cover types, forest canopy structure, and

forest canopy continuity for streamside areas and uplands. These data items will be collected in a highly repeatable fashion and compiled into stream reach units based on channel types for approximately 900 miles of the region's streams.

The core data collection methodology we recommend is based on the following process:

A. Delineating polygons for all forest canopy cover within the region.
B. Delineate subwatershed units based on channel types (or geomorphic units).
C. Delineate stream corridor, including associated wetlands.
D. Classify forest canopy data layer based on the following categories: within stream corridors, associated to stream corridors, and noncontiguous to stream corridors.
E. Determine the type of forest canopy and other vegetation within these polygons by summarizing landcover/vegcover classes from remotely sensed GIS data.
F. Use landcover data to characterize the non-forested vegetation and landcover.
G. Data manipulation to generate summary data for streams and watersheds.

Mapping products for the October 20, 2000 Goal 5 TAC

1. Map 1: Rock Creek Watershed: polygons for forest canopy contiguous and noncontiguous with stream corridors

2. Map 2: Land cover types within forest canopy polygons

3. Map 3: Rock Creek Watershed: geomorphic subwatershed units

How our stream corridor inventory will fulfill our goals:

1. Comply with statewide planning goals, especially Goal 5

We believe the proposed methodology for our inventory approach satisfies the requirements of the Goal 5 rule. Staff is preparing an analysis that will describe goal compliance issues in detail. We are also attempting to coordinate our inventory with local governments to avoid duplication of efforts, especially for those local governments which are currently updating their respective Goal 5 programs.

2. Establish baseline conditions and monitor changes over time

This inventory project will determine the location, quality, and quantity of vegetation associated with streams and rivers within Metro's jurisdiction. We are proposing a mapping methodology that will be applied periodically over time to reliably evaluate changes in width, quality, and continuity of habitat within stream corridors and upland areas.

Staff is currently researching objective measures of habitat conditions in order to characterize the ecological health of stream corridors and upland habitats. These measures can be used as a proxy for identifying "properly functioning conditions."

Below is a list of possible objective ways we can display and evaluate the data we collect in this inventory project.

A. *Watershed delineation.* We will identify the major watersheds in the region (Lower Willamette, Columbia, Clackamas, Tualatin, and Sandy). Subwatersheds within these larger watersheds will be identified in consultation with local governments.

B. *Stream geomorphic unit determination.* Metro has classified each stream in the region according to geomorphic units, or channel types. Two physical characteristics, gradient and confinement, characterize channel types. A total of eight classifications were used as adapted from the Oregon Watershed Enhancement Board. Paul Fishman Associates completed this work for all streams in the Metro region for the December 1999 Streamside CPR document.

   Classification of channel types allows us to link geomorphic conditions and existing vegetation characteristics. We can aggregate these units to analyze the entire stream length, or a particular tributary. This method will also allow us to link with other data such as total impervious surface to enable a composite picture of watershed health.

C. *Stream Corridor definition.* The widths would be defined as set forth in the December, 1999 Streamside CPR: 200 feet on each side of streams from top of bank, slopes exceeding 25% occurring within 175 feet of the stream, and floodplains

D. *Upland wildlife habitat definition.* For purposes of the inventory, we will be mapping vegetation cover that extends beyond the stream corridor mapping unit. The inventory will focus on forest land cover, but shrub, agriculture, and meadow categories will be considered for mapping.

E. *Landcover data utilization.* Using 1998 Landsat imagery, we can analyze the kind of vegetation (or lack thereof) within the unit of analysis. These landcover types can be further evaluated using year 2000 ortho photos. Landsat imagery enables classification of 16 landcover types. These images are used as one of the primary data sources for the Metro Greenspaces Natural Area Program.

   Coniferous Forest (closed, open, scattered)
   Deciduous Forest (closed, open, scattered)
   Mixed Forest (closed, open, scattered)
   Shrub (closed, open, scattered)
   Other (water, barren or sparse, meadow/grass)
   Agriculture (low structure, high structure)

These landcover types can be collapsed to facilitate analysis. For example, the nine forest canopy categories can be collapsed into one category: forest canopy. Similarly, the three shrub canopy layers can be collapsed into a single layer. This aggregation could simplify evaluation of data, but at the same time would retain the more detailed data for further biological analysis.

F. *Wetlands and lakes.* GIS data depicting wetlands and lakes will be combined with landsat imagery to enhance the fish and wildlife inventory.

G. *Evaluating the data.* Utilizing the above information, the following objective measures are possible for characterizing stream corridors and upland wildlife habitat:

Enhanced Metro Goal 5 Inventory	
Possible Fish and Wildlife Habitat Measures	
Attribute	**Description of Measure**
A. Width of vegetated corridor	Minimum & maximum width Average & median width
A.1. Width (% > 50 feet)	Percentage of segment, stream reach, or watershed with vegetated corridor exceeding 50 feet Rating scale: Excellent, good, fair, poor
A.2. Width (% > 100 feet)	Percentage of segment, stream reach or watershed with vegetated corridor exceeding 100 feet Rating scale: Excellent, good, fair, poor
A.3. Width (% > 150 feet)	Percentage of segment , stream reach, or watershed with vegetated corridor exceeding 150 feet Rating scale: Excellent, good, fair, poor
A.4. Width (% > 200 feet)	Percentage of segment, stream reach, or watershed with vegetated corridor exceeding 200 feet Rating scale: Excellent, good, fair, poor
B. Connectivity	Number of road crossings, ?, development encroaching to top of bank per mile Rating scale: high, medium, low fragmentation
C.1. Forest Canopy	Acreage and percent of forest canopy by type (open, scattered, closed) per segment, stream reach, or watershed
C.2. Wetlands and lakes	Acreage and percent of wetlands and lakes per segment, stream reach or watershed (Title 3 wetlands and lakes)
C.3 Shrub Canopy	Acreage and percent of shrub canopy layer per segment, stream reach, or watershed

C.4. Agriculture, meadow and grass	Acreage and percent of other vegetation categories (agriculture, meadow, and grass) per segment, stream reach, or watershed (excluding Title 3 wetlands)
D. Urban	Acreage and percent of segment, stream reach, and watershed in urban use
E.1. Upland Forest Canopy	Acreage of upland forest canopy (combining open, scattered, and closed) contiguous to stream corridor by segment, stream reach or watershed
E.2. Upland non-forest vegetation	Acreage of upland non-forest vegetation contiguous to stream corridor by segment, stream reach or watershed
E.3. Upland Forest Canopy contiguity	Linear feet and percent of stream corridor boundary that is contiguous to an upland forest canopy

H. Evaluation of stream corridor and upland habitat data. The above measures will be compiled for each geomorphic unit, stream reach, and watershed in the region. This will allow analysis of stream corridor and upland habitat conditions and how they vary across the region. The analysis can be repeated at periodic intervals to allow comparison of conditions across time. Stream reaches and watersheds can then be monitored to show where conditions are improving, remaining the same, or declining.

3. Program implementation

The inventory data and mapping information can be used by local governments as a source of information in developing local plans, reviewing development applications and changes in local zoning. For example, local governments could condition development to avoid fragmenting forested areas within stream corridors.

4. Restoration opportunities

The inventory data and mapping information can be used in conjunction with other information sources such as local watershed assessments to help identify and prioritize actions to restore or enhance streams and watersheds. For example, areas that are in degraded condition can be identified and evaluated for restoration potential.

5. Program evaluation and assessment

The results of periodic monitoring can be used to assist in determining whether regional goals for protecting the integrity of stream corridors and watersheds are being realized. These goals are further articulated in the Regional Framework Plan, the Regional Urban Growth Goals and Objectives, and Metro's Vision Statement for stream corridors. In addition, the data will help Metro address the development of performance measures to evaluate progress toward achieving 2040 planning objectives.

UGB PERIODIC REVIEW PROCESS

YEAR 2001

Regional Land Analysis
- vacant land analysis
- forecast
- UGB capacity analysis
- Performance measures

(Metro staff analysis)

Complete Communities Discussion
- jobs land location
- additional capacity discussion, within existing UGB
- additional capacity discussion, through UGB expansion
- jobs/housing issue analysis
- tax inequities
- stakeholders- local govt. discussions

Subregional Area analysis

Regional Policy Discussion

Metro Scope Analysis

Regional Discussion on Accommodating Growth
Public Outreach- 2040 Conference

YEAR 2002

UGB Amendment Decisions by the Metro Council

Metro Fish and Wildlife Habitat Protection Plan*

2000-2001 what year!

METRO

DRAFT

Time Line and Schedule

11/13/00

Months: Oct Nov Dec (2000) Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec (2001)

Item	Timeline
Vision	------------- (Oct–Nov)
Inventory	
Pilot Study	****------- (Oct–Nov)
Full Inventory	************** (Nov–Jan)
Science Paper	*******************---------------------------- (Oct–Apr)
Significance Determination	************---------------- (Jan–Apr)
ESEE	
Quick Draft	**********-------------------------------------- (Feb–Jul)
Full Analysis	* * * ************************------------------- (Jan–Jul)
Program	
Regional Safe Harbor	* * * * * * * * * * * * * * * * ****************--------- (Jan–Aug)
Local Environmental. Discretionary Review	* * * * * * * * * * * * * * * * ****************--------- (Jan–Aug)
Riparian District Plan	* * * * * * * * * * * * * * * * ****************--------- (Jan–Aug)
✓Incentives	* * * * * * * * * * * * * * * * ****************--------- (Jan–Aug)
Final Report	******-------- (Jul–Aug)
Functional Plan	************-------------------------- (Jul–Nov)
Public Outreach	
MTAC	- --- (Jan–Dec)
WRPAC	- --- (Jan–Dec)
MPAC	- --- (Jan–Dec)
Metro Council	
GMC	------------------------------ (Sep–Dec)
Full Council	------------------------------ (Sep–Dec)

4 FTE

Ambitious!

3200

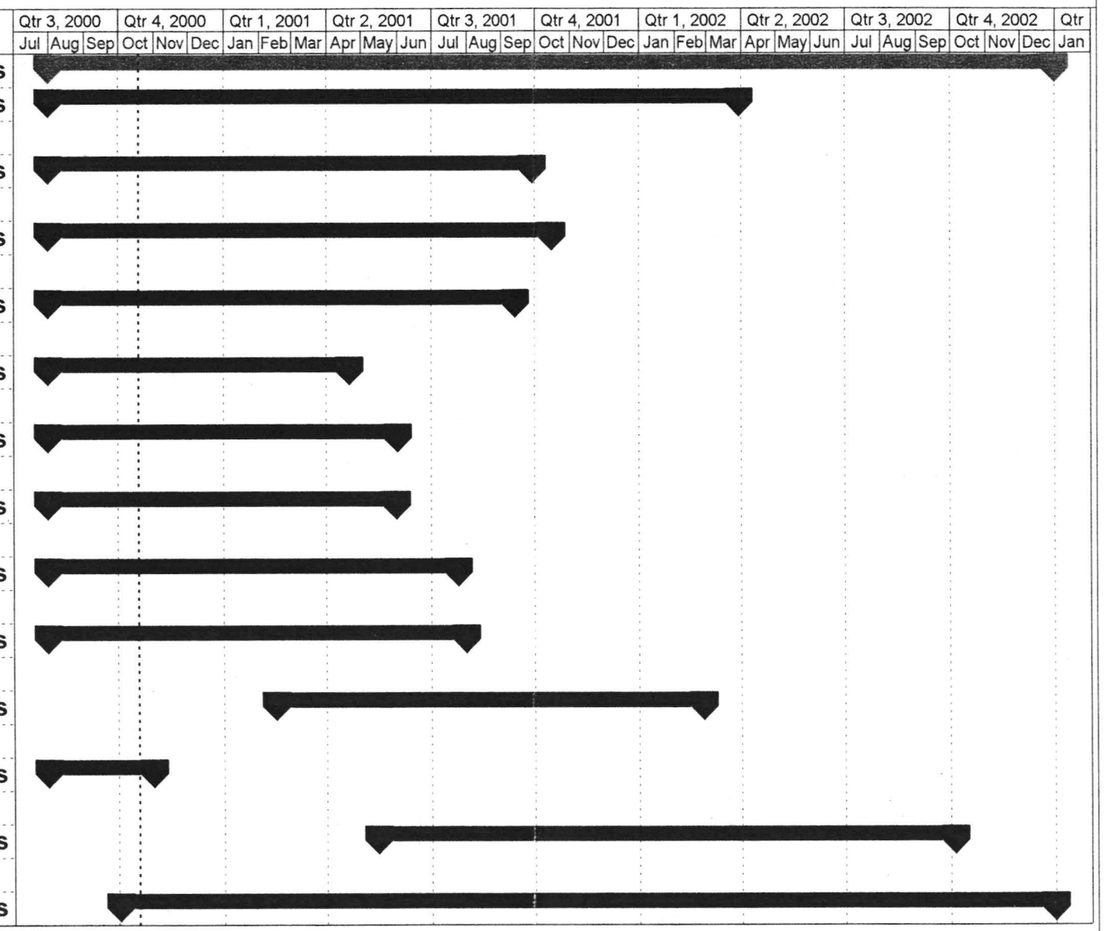
STAFF relationships

50 hours enhanced GS inventory

*****Production -------Review * Assumes no further production work needed as a result of review process, no joint MPAC/MTAC subcommittee and that review committees (WRPAC, MTAC and MPAC) need no more than 3 meetings per product to complete recommendations. \\alex\work\gm\long_range_planning\staff\turpel\old_I\Markt\Goal 5\Metro Fish and Wildlife Habitat Protection Plan timeline.doc

Periodic Review Work Program- 2000 to 2002

ID	Task Name	Duration
0	**Periodic Review Work Program**	**623 days**
1	**1 Land Analysis**	**426 days**
12		
13	**2 Forecast**	**296 days**
21		
22	**3 Basic Research Projects**	**307 days**
31		
32	**4 Performance Measures- Land in the UGB**	**285 days**
38		
39	**5 General Policy Research- staff**	**183 days**
47		
48	**6 Evalaute Economic Development Policies**	**212 days**
55		
56	**7 Community Visioning- Growing the UGB**	**211 days**
59		
60	**8 Metro Scope Modeling**	**248 days**
73		
74	**9 Goal 5**	**253 days**
77		
78	**10 Metro Annual Report (UGR)**	**265 days**
89		
90	**11 Jobs/Housing Sub Area Analysis- 1999 Data**	**65 days**
97		
98	**12 Public Involvement**	**361 days**
101		
107	**13 Council Decisions/ Milestones**	**580 days**



Project: Periodic Review Work Program
Date: Wed 10/18/00

Task | Milestone | Rolled Up Critical Task | Split | Group By Summary
Critical Task | Summary | Rolled Up Milestone | External Tasks
Progress | Rolled Up Task | Rolled Up Progress | Project Summary

Fiscal Impacts of Ballot Measure 7 on State and Local Governments: An Analysis of Selected Regulations

Prepared by

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October 2000

Project 4060

Table of Contents

Executive Summary

PURPOSE

This report evaluates Ballot Measure 7, which, if passed, would require state and local governments to pay compensation if they enact or enforce a regulation that lowers the value of an owner's property by restricting its use. To date, there remains a considerable amount of uncertainty about the scope and fiscal impact of the measure. This study seeks to inform the electorate by providing objective answers to the following questions:

- What types of regulations, rules, and goals would be covered under Measure 7?
- Were Measure 7 to become law, what would be the impact on state and local government budgets of a *subset* of these regulatory policies?

As noted in the second question, time and data constraints permit an analysis of only a small subset of the rules and regulations that could trigger compensation under Measure 7. Moreover, we estimate those impacts for only a limited number of jurisdictions. Consequently, our work serves to illustrate costs for a few isolated cases and does not attempt to provide a comprehensive assessment of the measure's fiscal impact. Our analysis considers only *fiscal impacts to government* and does not address the broader benefits or costs to society.

Measure 7 would increase the budgetary cost of implementing and enforcing regulations. In response to those increased costs, governments may issue fewer regulations, or may change the rigor with which they enforce current ones. While such a behavioral response is possible—perhaps even likely—we have no way of predicting the degree of that response. *Therefore, our estimates assume that the regulatory behavior of state and local governments would not change with the passage of this measure.*

KEY FINDINGS

AFFECTED REGULATIONS

We identify 90 state and local government actions we believe could trigger compensation under the initiative (see Table 2 and Table 3 in the main body of the report). Comprehensive land-use plans, zoning ordinances, and subdivision ordinances are the most obvious candidates. However, the impact would extend beyond traditional land-use restrictions because the initiative specifically defines property to include structures, minerals, forest products, and other crops. Consequently, building codes, safety regulations, and a variety of environmental regulations are also covered by the measure.

TEMPORAL SCOPE

Like other ballot measures that preceded it, this measure—if passed—would face legal challenges and could be modified by the state courts. The courts' rulings on the measure's *degree of retroactivity* would be a key determinant of the measure's fiscal impact. For example, in awarding claims related to the urban-growth boundaries (UGB), which were adopted in the late 1970s, the courts may deny compensation to people who purchased affected properties in the 1980s and 1990s *after the regulation went into effect*. However, there is ambiguity on this point. Measure 7 states that compensation is required when a regulation is "first enforced or applied," which has led some legal observers to conclude that the measure would make nearly all landowners eligible for compensation regardless of ownership tenure. That is, the measure would be "fully retroactive." If courts consider the measure to be fully retroactive, the estimated fiscal impacts, for certain regulations, would increase substantially.

To help address the question of the proper interpretation of the measure's temporal scope, we sought a legal opinion from the former City Attorney for Lake Oswego, Jeff Condit. Mr. Condit has concluded that the measure could be "fully retroactive" although ambiguity persists. His full opinion is found in Appendix C.

FISCAL IMPACTS

We have neither the resources nor the technical capabilities to forecast with any certainty the fiscal impact of the more than 90 types of regulations, applied by hundreds of state and local government entities throughout Oregon. We have chosen case studies in a variety of geographic areas, dealing with a range of topics (land use, environment, and other), at a variety of scales.

The case studies we have selected cover five types of regulations: 1) municipal zoning, 2) public-beach access and coastal-resource protection, 3) Oregon's Forest Practices Act, 4) urban-growth boundaries, and 5) rural-subdivision restrictions. *Our work reports the claims for only these selected regulations. We do not attempt to make a comprehensive, statewide assessment of the measure's fiscal impact.* Given the ambiguity surrounding the measure's temporal scope, we provide a pair of estimates for each case study. One estimate reports the claims assuming the measure *is partially retroactive* (that is, only people who held property before a regulation went into effect would receive compensation). A second estimate reports claims assuming full retroactivity (that is, all affected property would receive compensation regardless of ownership tenure).

Table 1 summarizes claims for compensation for selected regulations and jurisdictions.

- Recent and pending municipal zoning. Municipalities update and change land-use zones in pursuit of economic and social goals. Once a zone designation is set, the market recognizes the income-producing potential of the allowed use and the land value changes accordingly. Any subsequent change to the zoning is likely to impact the value of the land, if even by a small amount. We reviewed recent and pending zoning changes in Portland and Salem and found three examples of recent zoning changes that could generate Measure 7 claims. Portland's Neighborhood Proposal for Southwest, as currently drafted, could generate claims of up to $8.3 million. In Salem, the City could pay compensation of nearly $13 million associated with the North Salem Downtown Plan and restrictions on cell towers on residential properties.

- Public-beach access and Coastal-Resource Protection. Beachfront property owners could claim that the Oregon Beach Bill reduces property values by precluding development on the dry sand adjacent to their properties. Specifically, we evaluate coastal properties on the 63 miles of the Oregon coastline that is zoned for development[1]. Assuming public access reduces property values by 5 percent, we estimate Measure 7 claims related to the Beach Bill would fall between $15 million and $78 million *depending on the degree of retroactivity*.

- Oregon's Forest Practices Act, adopted in 1971 and effective in 1972, regulates harvest practices and other forest operations; for example, a certain number of trees are to be left unharvested in riparian areas, clear-cuts are limited in size, and harvested sites must be replanted. According to the Oregon Department of Forestry, this translates into a 6% loss in timber volume for Western Oregon and 2% loss in Eastern Oregon.

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[1] The state of Oregon owns the beaches and lands up to the high tide line. Oregon's beach bill assured public access along the dry sand portion of the beach (thereby prohibiting structures) up to a survey line calculated as 16 feet above the mean high tide line. However, this public easement is reinforced or underlain by a public easement inherited from native Oregonians. (*State ex rel Thornton v. Hay.*) As such, it can be argued, coastal shoreland owners never acquired title to this aspect of the property and, under *Lucas v. South Carolina Coastal Conservation Commission*, would not be entitled to compensation under Measure 7. However, there have been continuing challenges in Oregon's appellate courts to Thornton and to the concept of a public easement along the beaches. To date, the U.S. Supreme Court has refused to consider the matter but some lawyers continue to argue the invalidity of the easement found in Thornton and who would logically contend that compensation for this access under the Beach Bill would be required by Measure 7.

- Urban-growth boundaries. Economic theory suggests, and several empirical studies support the conclusion, that growth controls affect land values. In Portland, for example, land just *inside* the urban-growth boundary (UGB) is worth up to 30 times the amount of land just *outside* the UGB. Under Measure 7, eligible landowners of property outside of the boundary could claim compensation for losses associated with the UGB policy. Given the large amount of acreage affected, the UGBs that surround Oregon's major population centers could trigger claims in the billions of dollars—*assuming governments continued to enforce those boundaries.*

- Recent restrictions on rural land divisions. The Oregon Department of Land Conservation and Development recently released new rules governing the subdivision of land in rural residential "exception areas." Roughly 89,000 acres of land that could have previously been allowed by County zoning to be subdivided into half-acre and acre lots can now only be subdivided into lots two acres or larger. We estimate claims related to this policy would total $56.7 million.

The fiscal impacts reported in Table 1 do *not* incorporate legal and appraisal fees that would be associated with each claim. They additionally assume that all eligible landowners would file for compensation. However, it's reasonable to expect that less than 100 percent of eligible claimants would participate in the process. Some landowners would be unaware of their eligibility, and others may be aware of their eligibility but would forego filing a claim because the associated legal and time costs would be larger than their expected award. We would anticipate that the rate of participation would likely be higher for some regulations that lend themselves to class-action lawsuits. Table 12, in the main body of the study, reports our estimated claims assuming different levels of participation.

Table 1: Estimated Claims for Selected Regulations and Jurisdictions

	Estimated Claims Assuming *Partial* Retroactivity	Estimated Claims Assuming *Full* Retroactivity
Recent Municipal Zoning[1]		
Portland's Neighborhood Proposal for SW	$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 and Coastal Conservation	$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
Restrictions on Rural Land Divisions[1]	$56,737,500	$56,737,500

Source: ECONorthwest

[1] Governments enacted these regulations recently, so there is no difference in estimates under the full and partial retroactivity assumptions.

CREDENTIALS OF REPORT AUTHORS

This report was prepared by John Tapogna, Terry Moore, and Jim Ebenhoh of ECONorthwest under contract to 1000 Friends of Oregon. ECONorthwest is the Northwest's largest economics consulting firm and has a staff of 35 in offices in Portland, Eugene, and Seattle. ECO works for private- and public-sector clients throughout the United States, with an emphasis on the West and Pacific Northwest. Since 1974, ECO staff has completed more than 1,000 projects in economics, finance, planning, and policy evaluation. We provide resumes for Mr. Tapogna, Mr. Moore, and Mr. Ebenhoh in Appendix D.

PEER REVIEW

Members of Willamette University's Public Policy Research Center conducted peer review on several drafts of this report. Drs. Joseph Bowersox, Russ Beaton, and Thomas Hibbard conducted the reviews under the direction of PPRC director Dr. Laura Leete. In addition, we received valuable technical assistance from Dr. Arthur O'Sullivan of Oregon State University. However, the authors are solely responsible for the content.

Section 1

Introduction

PURPOSE

Ballot Measure 7 would require that state and local governments to compensate landowners when a state or local law or regulation has the effect of reducing property value. If passed, property owners could claim compensation related to a range of laws and regulations, including zoning-use restrictions, resource-management and environmental-protection rules, and public infrastructure requirements. To date, there remains a considerable amount of uncertainty about the scope and fiscal impact of the measure. This study seeks to inform the electorate by providing objective answers to the following questions:

- What types of regulations, rules, and goals would be covered under Measure 7?

- Were Measure 7 to become law, what would be the impact on state and local government budgets of a *subset* of these regulatory policies?

As noted in the second question, time and data constraints permit an analysis of only a small subset of the rules and regulations that could trigger compensation under Measure 7. Moreover, we estimate those impacts for only a limited number of jurisdictions. Consequently, our work serves to illustrate costs for a few isolated cases and does not attempt to provide a comprehensive assessment of the measure's fiscal impact.

Our analysis considers only *fiscal impacts to government* and does not address the broader benefits or costs to society, or the pattern of incidence of the current and proposed policies on taxpayers. A full evaluation, in contrast, would look at the impacts of regulation (both benefits and costs) on society, the broader economy, and the environment, rather than just at the impacts on the public sector. Some regulations provide benefits in excess of their costs, while others impose burdens in excess of their benefits. Therefore, the overall effect of Measure 7 depends on which regulations would be eliminated and whether those regulations impose net costs or net benefits.

We do not take a position in this report on issues like whether private property is over- or under-regulated, whether compensation would fairly distribute the costs of regulation, or whether the regulatory retrenchment that may occur would do more benefit or harm to the economy and quality of life in Oregon. Rather, we are trying to answer a specific question about Measure 7: what are some examples of the fiscal impact, on state and local governments in Oregon, of paying the compensation that the measure proposes, assuming all regulations stay in place? Ultimately, in concept at least, voters will be trying to answer whether the balance of fairness and efficiency is better under Measure 7 or the existing system, and whether they

are willing to bear larger, general taxes or do without some of the regulations that are in place.

In any analysis of this scope, some assumptions must be made. Since conclusions depend so heavily on assumptions, we have tried to be thorough in documenting those assumptions, both in general (in Section 3) and for the specific cases that we have chosen to evaluate (Section 4).

BACKGROUND ON TAKINGS AND MEASURE 7

The takings clause of the Fifth Amendment to the U.S. Constitution states "nor shall private property be taken for public use, without just compensation." Article I, Section 18 of the Oregon Constitution echoes this federal clause, stating that "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation..." Typically the courts have interpreted this to mean a physical taking of land, where the government acquires property—that it desires for some public purpose—from the landowner. A "regulatory taking," where property values are diminished by regulatory action, is also possible through the process of inverse condemnation, but it is less common. Property owners have long been able to claim compensation for regulatory takings that deprived them of nearly all economic use of their land,[2] but courts have only recently broadened the grounds for compensation. Precedent-setting cases like Dolan v. City of Tigard and Lucas v. South Carolina Coastal Council, for example, require that regulations have a logical and proportional relationship to the effects of the land use.[3]

Some people believe that the Fifth Amendment and its interpretation by the courts is inadequate, and that measures are needed to both reduce the infringement of private property rights resulting from government regulation and to ensure compensation in the event of such infringement. A variety of legislation has been proposed at both the national level and in various states to achieve these goals. Measures in Washington and Arizona were defeated in the past decade, while Texas, Louisiana, Mississippi, and Florida all currently require compensation for regulations that reduce property value by some threshold amount.

Measure 7 is different from these other state laws in that it would require compensation for any reduction in fair market value, regardless of the extent of the reduction. Specifically, Measure 7 would require government payment ("compensation") to landowners whenever a state or local law "has the effect" of causing any reduction in the fair market value of real property by restricting its use. The measure applies to any state or local statute, administrative rule, ordinance or other enforceable enactment of government.

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[2] See, for example, Pennsylvania Coal Co. vs Mahon 260 US 393 (1922).

[3] The proportionality criteria has been held by the Supreme Court to apply only in the context of dedications.

The measure defines real property to include buildings, minerals, timber and crops. A "reduction in fair market value" includes costs to protect habitats or similar environmental resources or open space, historical, archaeological or cultural resources, or low income housing.

Measure 7 exempts (1) federal laws; (2) laws prohibiting selling pornography, performing nude dancing, selling alcohol or controlled substances, or gambling; and (3) "adoption or enforcement of any historically and commonly recognized nuisance laws." The third exemption is to be narrowly construed in favor of requiring payment.

We include the full text of Measure 7 in Appendix A. In addition, we requested two legal opinions in conjunction with this fiscal-impact analysis, which we include as appendices. In Appendix B, Donald Stark and John Osburn, of Bullivan-Houser-Bailey, analyze how courts would incorporate the notion of market-demand constraints into their compensation rulings. In short, the authors find that numerous claimants could receive compensation for a lost business opportunity even if the market would have actually supported only one of them. In short, the opinion suggests that courts could over-compensate property owners for Measure 7 related claims. In Appendix C, Jeffrey Condit, the former City Attorney for Lake Oswego, provides a legal opinion on the measure's degree of retroactivity and finds that the measure could be reasonably interpreted as fully retroactive. Full retroactivity would imply that affected landowners could file for compensation *regardless* of when they purchased a property and would substantially increase the fiscal impact of the measure.

ORGANIZATION OF THE REPORT

This report consists of the following sections:

- **Section 1, Introduction.**
- **Section 2, Scope of Measure 7.** This section describes the types of government actions that would be newly subject to compensation requirements, as well as those that might be.
- **Section 3, Study Methods.** This section provides an overview of our study methods, including the basic estimation techniques and key assumptions.
- **Section 4, Case Studies.** This section describes the specific methods behind five individual case studies and presents our estimates of compensation required for each of the case study regulations.
- **Section 5, Conclusions.** In this section we draw conclusions from the case studies to discuss the likely overall effect of Measure 7.
- **Appendix A.** This appendix provides the full text of Measure 7.

- **Appendix B.** This appendix provides a legal opinion on how courts would incorporate the notion of market-demand constraints into their compensation rulings.

- **Appendix C.** This appendix provides a legal opinion on the measure's degree of retroactivity.

- **Appendix D.** This appendix provides the qualifications of the report's principal authors.

Section 2

Scope of Measure 7

In this section we describe the regulations we believe are almost certainly covered by Measure 7, and those that are possibly covered by Measure 7. The text of Measure 7 itself describes limitations to its applicability. There are other critical issues (e.g., relating to the temporal scope of Measure 7[4]) that we address in more detail in Section 3 on study methods.

Table 2, at the end of this Section, summarizes our conclusions, listing the state and local government actions we believe could trigger compensation under Measure 7. In Table 3, we classify a number of additional regulations as "possibly covered" because they could be deemed as exceptions as defined by Measure 7. These lists are not exhaustive, and if Measure 7 became law, the legal process would undoubtedly uncover other regulations that would generate claims.

REGULATIONS ALMOST CERTAINLY COVERED BY MEASURE 7

Measure 7 applies to regulations that restrict the use of private property and thereby reduce its value. Comprehensive land-use plans, zoning ordinances, and subdivision ordinances are the most obvious candidates to fall under Measure 7's scope. The impact would extend beyond traditional land-use restrictions because Measure 7 specifically defines property to include structures, minerals, forest products, and other crops. Consequently, building codes, safety regulations, and a variety of environmental regulations are covered by Measure 7.

In addition to covering regulations that restrict property use, the measure would compensate landowners for costs associated with "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." Presumably this means that any landowner expenditure required by the government requires equal compensation to the extent that it depresses property values by reducing the profitability of the land use.

Measure 7 is clearly focused on the *costs* of regulations. It does, however, state that "net costs" must be taken into account, though it does not define net costs. By most definitions, "net costs" implies that there are some benefits somewhere that must be subtracted from gross costs to get net costs. It will be up to the courts to decide what this language actually means, ECONorthwest is not qualified to offer interpretations of law. However,

[4] For example, at what point did a person have to purchase a property, relative to the adoption or enforcement of a government policy, to be eligible for compensation under the terms of Measure 7? The temporal scope does not affect which regulations are covered, but which landowners are entitled to compensation for a given regulation—all current landowners subject to the regulation, or just those who were the landowners when the regulation was adopted.

government actions can impair market value, on the one hand, but enhance its value on the other (by facilitating the provision of public services to the property or by protecting it from the externalities of other property owners' behavior). Hence, the Oregon measure may apply only to those regulatory actions that, *on balance*, impair an individual property owner's wealth.

Our reading of Measure 7 is that it does not intend a broad, long-run valuation of benefits, but one limited to the immediate and uncontroversial benefits to a property owner of complying with a regulation. For example, if a regulation were to require a property owner to maintain natural drainage on a property, there might be some benefit to the property owner if his own property were now less prone to flooding: that benefit would have to be netted. But, by our reading of Measure 7, the larger benefits to society presumed to be generated when the regulation was adopted (e.g., flood control, water quality, habitat, and infrastructure efficiency benefits to society at large) are *not* considered and netted from the cost to the property owner of complying with the regulation.

REGULATIONS POSSIBLY COVERED BY MEASURE 7

Measure 7 limits its applicability in three cases: nuisance law; regulations prohibiting pornography, nude dancing, alcohol, controlled substances, and gambling; and laws that implement a federal mandate. The impacts of these limitations are not as straightforward as a quick reading might suggest: there are a number of regulations that may or may not require compensation, depending on the legal interpretation of Measure 7.

- Regulations designed to enforce nuisance laws. Measure 7 makes an exception for "historically and commonly recognized nuisance laws." Nuisance laws have extensive legal precedent giving the government broad powers to protect "public health, safety, and welfare." Because Measure 7 states that "the phrase 'historically and commonly recognized nuisance laws' shall be narrowly construed in favor of a finding that just compensation is required," we can assume that a line is or must be drawn somewhere. In compiling our list of affected regulations, we assume that limits on excessive noise, toxic fumes, and other effects of property use that cause harm to public health will continue to be interpreted as nuisance law. But the legal line is likely to be drawn by future litigation, since there appears to be no pre-existing definition of what a narrow construction of nuisance law includes and excludes.

- Regulations on pornography, nude dancing, alcohol, controlled substances, and gambling. Measure 7 makes an exception for regulations that prohibit the use of a property for "selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor." Presumably these are activities that are unambiguously bad and require government regulation, so there is no obligation for compensation. These uses could include taverns, restaurants, book stores, and pharmacies. Measure 7 says that landowners are not

entitled to compensation for a regulation that prohibits them from the listed activities, but it does not exclude them from compensation under other regulations. For example, a landowner could not claim compensation for a prohibition on building a tavern on her land, but she could claim compensation if her existing tavern were not allowed to expand its parking lot closer to a protected stream.

- Regulations that implement federal law. Measure 7 declares that state and local governments may impose a regulation to implement a requirement of federal law without payment of compensation, but that this imposition must be "to the minimum extent required." Therefore, while state regulations dealing with salmon recovery or clean air implement federal law, compensation would be required if the state regulations went beyond the minimum required by the federal law. Determining what the minimum requirements are is not easy, as Oregon is finding out in addressing salmon recovery. This difficulty would likely lead to litigation if the measure were to pass.

- Regulation on business not property. It is not clear whether regulations that adhere to the *activity* on a site, rather than the *property* itself, would require compensation. Measure 7 refers to 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." Regulations such as financial regulations applying to banks, or hygiene standards for food manufacturers, may be seen as applying to an activity regardless of location, rather than the property itself. Nevertheless, these regulations could potentially decrease property values by not allowing a more profitable use on the site. Therefore we cannot rule out these regulations as potential grounds for compensation under Measure 7.

COSTS FOR LITIGATION, ADMINISTRATION, AND OTHER COSTS

In theory, if transaction costs were zero the compensation to landowners would be the extent of the fiscal impact on government. But in reality, transaction costs for this type of measure are high. Government will have costs for appraisals and legal assistance. The more disagreement there is on the impact of a regulation on a property's value, the more appraisals and legal assistance will be required. Given the many ambiguities in Measure 7, there is also likely to be disagreement and litigation on the applicability of the measure. In addition, there will be bureaucratic costs resulting from government having to process all the applications for compensation. While we do not estimate the total fiscal impact of these transaction costs, we want to emphasize that the fiscal impact of Measure 7 includes more than the compensation required to landowners. At the time of our research, the State had begun estimating the costs of appraisals and legal assistance, but time did not permit our independent review of their estimates.

Table 2: List of Covered Regulations

No.	Type of Regulation	No.	Type of Regulation
	Land Use		
1	Urban Growth Boundaries	20	View Protection
2	Open Space Preservation	21	Fence or Hedge Restrictions
3	Farmland Protection	22	Requirement or Public Plaza or Public Open Space
4	Building Moratoria or Limitations	23	Requirement for Pedestrian Corridor or other Public Access
5	Concurrency Requirements	24	Requirement for Sidewalk Construction
6	Any Zoning Decision (Particularly Downzoning)	25	Landscaping Requirements
7	Building Height Limitations	26	Requirement for Ground Floor Retail
8	Setback Requirements	27	Requirement for Façade Improvements
9	Minimum Parking Requirements	28	Requirement for Public Restrooms
10	Maximum Parking Allowances	29	Requirement for Bicycle Parking
11	Access/Driveway Requirements	30	Prohibition on Condominium-Apartment Conversion
12	Minimum Density Requirements	31	Housing Requirement for Commercial Development
13	Maximum Density Allowances	32	Heavy Truck Restrictions on Streets
14	Minimum Lot Size Requirements		
15	Maximum Lot Size Allowances		Agricultural
16	Road Design Requirements for Subdivisions	33	Irrigation Restrictions
17	Traffic Generation Limitations		
18	Lighting Restrictions		Structural and Other
19	Restriction on Hours of Operation	34	All Building Codes (SEE NEXT PG)

No.	Type of Regulation	No.	Type of Regulation
35	Closure of Business due to Building Code Violations	50	Fishing and Hunting Regulations
36	Building Design Standards	51	Restriction on Tree or Vegetation Removal
37	Other Health and Safety Regulations Affecting Property Design or Use	52	Restriction on Coastal Walls or Restriction on Tsunami Zone Construction
38	Sign Regulations	53	Grading Restrictions
39	Restriction on Building or Property Use Due to Seismic Issue	54	Impervious Surface Restrictions
40	Restriction on Building Demolition, Addition, Alteration or Redevelopment Due to Historic Preservation Requirements	55	Solid Waste Disposal Restrictions
41	Hiring Requirements	56	Recycling Requirements
42	Rent Control	57	Setback Requirements for Erosion Control and Habitat Preservation
43	Expenditure Required for Seismic Upgrade	58	Construction Site Erosion Control Requirements
44	Expenditure Required to Protect, Provide, or Preserve Historical Archaeological, or Cultural Resources	59	Limitation or Moratorium on Water Use
45	Expenditure Required to Protect, Provide, or Preserve Low-income Housing	60	Limitation or Moratorium on Water Hookup
46	Fire Exit Requirements	61	Expenditure Required to Protect, Provide, or Preserve Wildlife Habitat
47	Disabled Access Requirements	62	Expenditure Required to Protect, Provide, or Preserve Wetlands
		63	Expenditure Required to Protect, Provide, or Preserve Ecosystems
	Environmental	64	Expenditure Required to Protect, Provide, or Preserve Open Space
48	Logging Restrictions, including Oregon Forest Practices Act	65	Expenditure Required to Protect, or Preserve Other Natural Areas
49	Grazing Limitations or Restrictions	66	Expenditure Required to Plant Street Trees

Source: ECONorthwest

Table 3: Regulations Possibly Covered by Measure 7

No.	Type of Regulation	No.	Type of Regulation
	<u>May or May Not be Covered by Federal Law Exemption</u>		<u>Regulation May Not Qualify as Property</u>
1	Pesticide Restrictions	16	Smoking Bans in Restaurants
2	Field Burning Restrictions	17	Hygiene Standards in Food Manufacturers
3	Animal Waste Disposal Restrictions	18	System Development Charges
4	Fire Exit Requirements	19	Property Tax Increase
5	Disabled Access Requirements	20	Other Fees
6	Effluent Discharge Limitations		
7	Storm water Disposal and Retention Requirements		<u>May or May not be Covered by Nuisance Exemption</u>
8	Air Quality Standards		
9	Salmon Recovery Regulations	21	Noise Restrictions
10	Creek Channelization and Piping Restrictions	22	Regulation of Noxious Odors
11	Wetlands Protection	23	Regulation of Toxic Fumes
12	Limitation on Mining, including Three Basin Rule	24	Regulation on Unsanitary Waste
13	Telecommunications Tower Restrictions		
14	Toxic and Hazardous Materials Regulations		
15	Restriction on Flood Plain Development		

Source: ECONorthwest

Study Methods

We have neither the resources nor the technical capabilities to forecast with any certainty the fiscal impact of the more than 90 types of regulations applied by hundreds of state and local government entities throughout Oregon. Case studies that focus on a particular class of regulations are a more manageable way to get some estimate of the magnitude of the impacts. We have chosen case studies in a variety of geographic areas, dealing with a range of topics (land use, environment, and other), at a variety of scales. *Our work reports the claims for only the selected regulations and jurisdictions. We do not attempt to make a comprehensive, statewide assessment of the measure's fiscal impact.*

The case studies we have selected cover five types of regulations:

- Municipal zoning
- Public-beach access and coastal conservation
- Oregon Forest Practices Act
- Urban growth boundaries
- Recent restrictions on rural land divisions

We describe the particular methods and data required for each case study in the next chapter. In this chapter, we discuss our basic estimation technique and the key assumptions we make in our analysis.

BASIC ESTIMATION TECHNIQUE

Measure 7 makes it clear that the change in "fair market value" is the amount of compensation that is required. So the methodological question is, How does one estimate fair market value and how it changes in response to various types of regulation?

Economic theory suggests that the costs (and benefits) of government actions (regulations) get capitalized (largely or in part) into property values. For example, if state government builds a highway or new interchange that increases the accessibility of a property, the value of that property increases (the travel time savings is "capitalized" into property values). If prior regulations have, in fact, reduced property rights and development options, then that reduction should be reflected in current property values. For example, if land is zoned for low-density residential use, with restrictions, in riparian areas, it will be less valuable than if higher-density commercial development is allowed (assuming the market exists for both uses).

There are, in concept, two ways to try to estimate the differences in property value that a regulation may cause:

- Compare the current property value to that which existed one minute prior to the *adoption* of the regulation to one minute afterwards.

- Compare the current property value to the hypothetical value of the property if it were in some alternative, more valuable use than what the current regulation allows.

The first method would be extremely difficult. Fair market value is not a question of fact but of opinion, and as such is dependent on appraisals rather than direct observation. That means we would need to look at appraisal data both before and after the adoption (and, potentially, enforcement) of every regulation. In fact, appraisals are not done in this fashion. Local appraisals done by county assessors in Oregon (which lead to property value assessments) are done on a multi-year cycle, with standard inflators applied each year. The effects of a regulation would not show up in government assessment data unless a landowner convinced the government to perform a post-regulation appraisal.

The second method seems both more intuitive and easier: it obviates the need to determine when current regulations were adopted, and by using a modeling approach based on a hypothetical scenario, it avoids the problem of searching for appraisal data for each property.

The basic method we use to estimate how fair market values change with restrictions on allowed uses is discussions with real estate and development consultants, realtors, appraisers, and market analysts, as well as our own review of property data through Internet sources and Metro's RLIS database. Appraisers in part base their estimates on the relationship of property values to the profitability of uses, through the capitalization mechanism.[5]

For all of our case-study analyses, we calculate an average change in value for an average affected property; we do not model each property individually. For example, if we know that 800 acres of land are affected by a particular regulation, we estimate the average decrease in property value on a per-acre basis and apply it equally to the 800 acres. In most cases, we provide a sense of our confidence in these estimates, and sensitivity analysis to show the variation in compensation with different per-acre property value losses.

In all cases, we present estimates of one-time, lump-sum costs associated with particular regulations. In cases where our initial estimates of payments are based on a future stream of lost income (for example, for the Oregon Forest Practices Act), we discount the loss of a future income stream to derive a one-time loss in property value. If new regulations continue to be passed,

[5] The standard equation for deriving the capitalized value of land is Property Value = (Annual Net Income of Property / Capitalization Rate)

our estimates understate the total costs that will occur over time, since our estimates only look at existing or soon-to-occur regulations.

KEY ASSUMPTIONS

Like many voter initiatives, the precise implications of this measure are open to interpretation and legal debate. Nevertheless, we must make some key assumptions about what will happen as a basis for our calculations.

- Government regulatory behavior. Measure 7 would increase the budgetary cost of implementing and enforcing regulations. In response to those increased costs, governments may issue fewer regulations, or may change the rigor with which they enforce current ones. While such a behavioral response is possible—perhaps even likely—we have no way of predicting the degree of that response. Therefore, our estimates assume that the regulatory behavior of state and local governments will not change with the passage of this measure.

- Legal interpretation and Constitutionality. Like other ballot measures that preceded it, this measure—if passed—would face legal challenges and could be modified by the state courts. We have no basis upon which to anticipate such rulings. Thus, we estimate fiscal impacts based on Measure 7 as drafted.

- Temporal scope. Our analyses consider the effect of a regulation on landowners that purchased the affected land *before* a regulation was adopted. Our estimates assume that an owner who purchased property *after a regulation went into effect* would not suffer the loss in value through enforcement or application of the regulation. For example, in our evaluation of urban-growth boundaries (UGB), which were adopted in the late 1970s, we assume people who purchased affected properties in the 1980s and 1990s would not be eligible for compensation.

  However, there is ambiguity on this point. Measure 7 states that compensation is required when a regulation is "first enforced or applied," which has led some legal observers to conclude that the measure would make nearly all landowners eligible for compensation regardless of ownership tenure. That is, the measure would be "fully retroactive."

  The following provides an example of full retroactivity. After enactment of Measure 7, an individual purchases a property outside of the UGB and attempts to develop it as a residential subdivision. The regional planning authority turns down the individual's building permit because it is outside the UGB, which is required by Oregon regulations. In effect, the government has *enforced* the UGB policy for *the first time* on that particular property. Under Measure 7's "first enforced" language the owner makes a claim for compensation. If courts deem such claims as eligible and the measure proves to be fully

retroactive, our estimates would significantly understate the fiscal impact of our selected examples.

To help address the question of the proper interpretation of the measure's degree of retroactivity, the project sought a legal opinion from the former City Attorney for Lake Oswego, Jeff Condit (see Appendix C). Mr. Condit has concluded that courts could reasonably interpret the measure as "fully retroactive."

- Actual claims. Not everyone who is eligible for compensation will claim compensation. High legal costs, small amount of potential compensation, or lack of knowledge about rights to compensation will reduce action by landowners. With each regulation, we present our estimate of compensation to all eligible landowners, and also an estimate that assumes that only a certain percentage of landowners will file for compensation.

- Demand constraints. Fair market value, which drives the claims for compensation under this measure, is not solely supply-driven. Tens of thousands of landowners in Oregon may claim that government land-use regulations (e.g., zoning and UGBs) kept them from developing high-value business parks, but those claims do not change the fact that only ten or twenty business parks may get built in Oregon in any given year. In other words, the collected claims of property owners could easily outstrip any estimate of what might have been built given reasonable assumptions about market demand. The same thing applies to building height restrictions; if every landowner in downtown Portland were allowed to build a 50-story building, market demand simply would not support it. A legal analysis, conducted by Donald Stark and John Osburn, suggests that courts rarely consider the effect of competition for a finite amount of demand (see Appendix B). Therefore, our analyses assume that competing claims for finite demand would *not* limit the amount of compensation required.

  However, our estimates do consider other demand-related factors, such as location, that would determine claims for compensation. For example, we assume that owners of land just outside the current UGB would receive higher compensation than owners of land several miles from the UGB.

CASE STUDY METHODS

The individual case studies described in the next section use the basic methods and assumptions described above, but apply to very different situations with very different data. The next section presents the methods and the findings of the case studies.

MUNICIPAL ZONING REGULATIONS (RECENT AND PROPOSED)

Municipalities update and change land-use zones in pursuit of economic and social goals. Once a zone designation is set, the market recognizes the income-producing potential of the allowed use and the land value changes accordingly.[6] Any subsequent change to the zoning is likely to impact the value of the land, if even by a small amount. Because zoning changes represent precisely the type of restriction addressed by Measure 7, we sought examples of recent and proposed changes to zoning codes that could potentially trigger a claim for compensation. We reviewed two scenario (a neighborhood-generated zoning proposal in Portland and recently adopted zone changes in Salem) to derive our examples. Both scenarios incorporate *downzoning*, whereby allowed uses are changed (or proposed to be changed) to something that uses land less intensively, and thus causes property to decrease in value. That case is equivalent to the claim that will be made if Measure 7 passes, where a landowner will claim that government zoning allowed him to use his land less intensively than he could have, and thus, to lose land value that should be compensated.

PORTLAND'S NEIGHBORHOOD PROPOSAL FOR SOUTHWEST

In 1997, eighteen neighborhoods in Southwest Portland advanced a plan that would downzone the use of 889 residential and commercial properties in some areas. The plan also proposed upzoning in other areas of Southwest Portland. The plan's primary purpose in the downzone areas was to reduce housing or commercial density, with the goal of preserving the character of the neighborhoods and addressing environmental concerns. In most instances, the proposed changes were small and would not yield a significant increase or decrease in property values. The neighborhood-generated zoning proposal used for this analysis did not include any responses or modifications by city staff or commissions. It is used here for illustrative purposes only, and was used because the proposal included examples of downzoning.

To accurately estimate the precise compensation of the changes under Measure 7, a property appraiser would consider the specific characteristics of each parcel and evaluate the real estate market for the existing and proposed uses. For the purposes of this estimate, we necessarily take a more simplified approach. First, we review typical land values for different types of uses. Then, we cull the proposed community plan for examples in which a zoning change appears to lower the underlying land value.

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[6] Clearly other factors affect land value, many of which relate to the location of a property. Implicitly we are holding locational and site characteristics constant by looking at a single property, so that we can attribute change in value to a change in use allowed by regulation.

Table 4 reports our assumed land values by land-use type, which are based on conversations with local real estate analysts. In general, zoning changes from commercial to residential or from higher-density residential to lower-density residential have the potential of lowering land values. Through our analysis of the community plan, we uncovered 12 downzoning examples—involving 87 acres of land—that could potentially trigger a claim for compensation under Measure 7 (see Table 6). We estimate potential claims by applying land values in Table 6 to the amount of acreage affected by each downzoning change. For example, the first listing in Table 6 involves 5.7 acres of land, which would change from a commercial to a multi-family use. Under the existing zoning, we estimate the land is worth $4.1 million (or, 5.7 acres multiplied by $720,000/acre). Under the proposed zoning, the value could fall to $2.5 million (or, 5.7 acres multiplied by $440,000/acre) and calculate a potential $1.6 million claim for compensation. Repeating that exercise for the remaining downzoning examples, we estimate the plan, as a whole, could generate claims of up to $17.4 million.[7]

We must discount this figure, though, to account for the fact that most of the property in Portland is already developed, and the limiting effect of downzoning will not occur until the current structures are in need of replacement. Table 5 shows our redevelopment assumptions. We assume that 90% of land is already developed, and that the structures have an average remaining lifespan of 15 years.[8] Therefore the loss caused by the inability to develop the land at the existing density will not occur until 15 years in the future, and it must be discounted. At a 6% discount rate, the loss is in 15 years is 42% of what the loss would be today. The loss, then, for the 90% of land that is developed is 42% of the loss that would occur today. The loss for the vacant 10% of land is not discounted; it occurs today. The overall, weighted loss is 48% of the $17.4 million loss that would occur today, or $8.3 million. Therefore, the plan would result in an estimated $8.3 million loss spread over 87 acres, which translates to an average $95,000 loss per acre.

[7] For the three cases of downzoning from Single-Family uses, and the case of downzoning from Commercial to Multi-Family Medium Density, the average value per square foot according to Metro's RLIS database is less than half of what the estimates in Table 2 would suggest. To keep our estimates of loss conservative, we use RLIS data in these cases.

[8] We assume that the average building has a lifespan of 30 years, and that the average building is currently halfway through that lifespan.

Table 4: Estimated SW Portland Land Values, by Type

Land Use	Value/Acre
Commercial	$720,000
Office (Southwest Portland)	350,000
Industrial	280,000
Multi-Family High Density	440,000
Multi-Family Medium Density	220,000
Multi-Family Low Density	150,000
Single Family (Improved Lot)	500,000
Open Space	15,000

Source: ECONorthwest based on information from local real estate analysts

Table 5: Redevelopment Assumptions

Parameter	Assumption
% of Land Developed	90%
Discount Rate	6%
Avg Remaining Lifespan (in years)	15
Discount Applied to % Developed	42%
Total Discount	47.55%

Source: ECONorthwest

Table 6: Downzonings and Potential Claims in Portland's Neighborhood Proposal for Southwest

Existing Use	Proposed Use	Acres Affected	Estimated Value (Existing Use)	Estimated Value (Proposed Use)	Potential Claim for Compensation	With Discount for Existing Development
Comm.	MF High	5.7	$4,132,800	$2,525,600	-$1,607,200	-$764,286
Comm.	MF High	0.7	496,800	303,600	-193,200	-91,874
Comm.	SF	0.5	331,200	230,000	-101,200	-48,125
Comm.	Open	5.6	4,046,400	84,300	-3,962,100	-1,884,131
Comm.[1]	MF High	12.5	9,007,200	5,504,400	-3,502,800	-1,665,716
MF High	MF Med	2.3	644,608	497,200	-147,408	-70,098
MF High	MF Med	20.7	9,121,200	4,560,600	-4,560,600	-2,168,741
Office	Open	1.7	743,600	25,350	-718,250	-341,556
SF[1]	MF Med	0.2	80,500	50,600	-29,900	-14,219
SF[1]	Open	28.1	2,079,897	421,350	-1,658,547	-788,703
SF[1]	Open	7.6	897,104	114,450	-782,654	-372,182
TOTAL	Open	1.3	202,364	19,950	-182,414	-86,745
		87.0	**$31,783,673.**	**$14,337,40**	**-$17,446,273**	**-$8,296,376**

Source: ECONorthwest, based on City of Portland data

[1] Information from Metro's RLIS database indicates that the existing value of this acreage is well below the averages reported in Table 4. In these cases, we use the RLIS data to estimate the existing value, which has the effect of the lowering the estimated claims for compensation.

SALEM'S NORTH DOWNTOWN PLAN

The City of Salem recently implemented its North Downtown Plan. Among other objectives, the City enacted the plan to demonstrate the feasibility of innovative housing in a central city. The City identified the North Downtown area as a place to develop a wide-range of new housing and mixed-use projects that take full advantage of the benefits of being near downtown, the riverfront, and the Capitol Mall.

As part of the plan, the City rezoned a number of properties from commercial to residential uses. We use the same method described for the Portland example to estimate potential claims under the Salem plan. Table 7 reports estimated land values, by type, for the North Downtown area. We apply the values to nine zoning changes that likely would generate a reduction in land value. Table 8 shows the Salem plan could generate up to $5.7 million in claims for compensation, with the majority of claims related to a change of 3.2 acres from a central-business-district use to multi-family residential use. Using the development assumptions in Table 5, we discount this total to $2.7 million to take existing "grandfathered" development into account. Therefore, the plan resulted in an estimated $2.7 million loss over 15.3 acres, which translates to an average $176,000 loss per acre.

Table 7: Estimated Downtown Salem Land Values, by Type

Land Use	Value/Acre
Central Business District	$1,200,000
Commercial Office	630,000
Duplex Residential	260,000
General Commercial	460,000
Multi-Family Residential	190,000
Retail Commercial	780,000
Single Family	210,000

Source: ECONorthwest

Table 8: Potential Claims in North Salem Downtown Plan

Existing Use	Proposed Use	Acres	Estimated Value (Existing Use)	Estimated Value (Proposed Use)	Potential Claim for Compensation	With Discount for Existing Development
Central Business	Mult Fam	3.2	$3,840,000	$608,000	-$3,232,000	-$1,536,941
Commercial Office	Single Fam	2.0	1,260,000	420,000	-840,000	-399,452
Commercial Office	Mult Fam	0.9	567,000	171,000	-396,000	-188,313
Commercial Office	Single Fam	0.4	252,000	84,000	-168,000	-79,890
Duplex Residential	Single Fam	2.9	754,000	609,000	-145,000	-68,953
General Commercial	Single Fam	1.9	874,000	399,000	-475,000	-225,881
General Commercial	Multi Fam	2.6	546,000	494,000	-52,000	-24,728
General Commercial	Multi Fam	0.8	168,000	152,000	-16,000	-7,609
Retail Commercial	Multi Fam	0.6	468,000	114,000	-354,000	-168,341
TOTAL		**15.3**			**-$5,678,000**	**-$2,700,108**

Source: ECONorthwest

Through our review of Portland and Salem ordinances, we uncovered a number of *historical* zoning restrictions that could generate claims for compensation in addition to those described above. Examples of past regulations that may be covered by Measure 7 include:

- Restrictions on building heights in the City of Portland that preserve the views of Mt. Hood from the Portland Rose Gardens. Landowners, who held property in the downtown core prior to the 1979 enactment of the restrictions could advance a claim for lost property value. The restrictions reduced building heights from about 450 to 250 feet, which directly reduced the income-producing potential of the properties.

- Preservation of golf courses. The City of Portland downzoned numerous acres in NE Portland from industrial to open space uses to ensure the preservation of two golf courses.

- Restrictions on cell phone towers in Salem. The City of Salem recently banned the construction of cell phone towers on residential properties throughout the City. Residential landowners could claim the restriction reduced the income-producing potential of their properties. In Sandy, Oregon, telecommunication companies have paid local residents $600-$1,500 per month in exchange for the right to build a tower, and the agreements last 30-50 years. Consequently, an eligible party could request lump-sum compensation of about $100,000[9]. We estimate the Salem market would support about 23 towers[10], but our legal analysis (see Appendix B) suggests that courts would *not* consider the market's demand constraint in awarding compensation. For the purposes of this estimate, we have assumed that 100 property owners would secure $9.9 million in Measure 7 compensation under this regulation. While we conservatively estimate that 100 property owners would file such claims, the City officials sent notices to 30,000 property owners who they deemed to be potentially affected by the regulation. Oregon's Measure 56 required the City to notify property owners of the regulation's impact on property values.

PUBLIC BEACH ACCESS AND COASTAL RESOURCE CONSERVATION MANDATES

As with other subjects, there is a great deal of uncertainty regarding the potential fiscal impact of Measure 7 as applied to Oregon's beaches, dunes

[9] This assumes a $600 monthly lease, 30-year agreement, and six percent real discount rate.

[10] We based the estimate on the number of towers present in two unrestricted areas: Atlanta, Georgia and Asotin County, Washington. Those two areas report about one cell phone tower per 1,300 households. Salem has 30,000 households, and therefore, would support 23 towers.

and coastal resources. These resources are protected through a combination of laws and regulations.

The state of Oregon owns the beaches and lands up to the high tide line. Oregon's beach bill assured public access along the dry sand portion of the beach (thereby prohibiting structures) up to a survey line calculated as 16 feet above the mean high tide line. However, this public easement is reinforced or underlain by a public easement inherited from native Oregonians. (*State ex rel Thornton v. Hay.*) As such, it can be argued, coastal shoreland owners never acquired title to this aspect of the property and, under *Lucas v. South Carolina Coastal Conservation Commission*, would not be entitled to compensation under Measure 7.

However, there have been continuing challenges in Oregon's appellate courts to Thornton and to the concept of a public easement along the beaches. To date, the U.S. Supreme Court has refused to consider the matter but some lawyers continue to argue the invalidity of the easement found in Thornton and who would logically contend that compensation for this access under the Beach Bill would be required by Measure 7.

But statewide planning Goal 18,"Beaches and Dunes" goes beyond the public easement provisions and the survey line in the Beach Bill: "Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditional stable and that are subject to ocean undercutting or wave overtopping, and on interdune areas (deflation plains) that are subject to ocean flooding." In addition, Goal 17, "Coastal Shorelands" contains conservation mandates for other lands and resources further inland. Thus compensation would be required under Measure 7 for these protections of coastal resources above the line drawn by the Beach Bill.

For the purpose of the following analysis, we have assumed that compensation would be required for the public access mandated by the Beach Bill. To some extent, even if that would prove not to be required, the fiscal analysis would have some application to lands beyond the Beach Bill but subject to Goal 18.

We consider coastal properties in the approximately 63 miles, or nearly 17.4 percent of the Oregon coastline, that is zoned for development.[11] These developed areas do not include cities such as Coos Bay and Reedsport that do not actually have beachfront property, nor do they include major state parks, such as those adjacent to Florence. In addition, we did not include in this anlaysis the beachfront and coastal lands in farm or forest zones. We

[11] From maps included in *The Oregonian*, July 6-8, 1997.

estimate the total value of this subset of coastline property to be $1.56 billion, based on an estimated average value of $4700 per running foot.[12]

Because it is difficult to know exactly how much value is lost by the requirement for public access and the conservation mandates of Goals 17 and 18, we present in Table 9 a range of percentage decreases as a result of public access. Assuming all current landowners are eligible for compensation, the total amount of compensation would range from $15 million to $78 million. The measure may not apply, however, to property that changed ownership since the passage of the Beach Bill in 1967. Table 9 presents compensation requirements for a range of ownership assumptions.

Table 9: Estimated Compensation for Public Access of "Beach Bill" and Coastal Goals on 63 Miles of Coast Zoned for Development

	% same ownership pre-1967				
%	10%	20%	30%	40%	100%
3%	$4,690,224	$9,380,448	$14,070,672	$18,760,896	$46,902,240
5%	$7,817,040	$15,634,080	$23,451,120	$31,268,160	$78,170,400
10%	$15,634,080	$31,268,160	$46,902,240	$62,536,320	$156,340,800
15%	$23,451,120	$46,902,240	$70,353,360	$93,804,480	$234,511,200

Source: ECONorthwest

In our final summary of the costs of compensation for Measure 7, we use the estimate representing a 5% taking, with 20% of current ownership pre-dating the Beach Bill. Our best estimate is that a 5% taking is a reasonable yet conservative assumption of the amount of property value that is lost through public access. In terms of duration of ownership, our best estimate is that 20% of the land is still owned by the pre-1967 landowners, based on an assumption of 5% property turnover annually, but without reviewing County deed records this is difficult to verify.

OREGON FOREST PRACTICES ACT

The Oregon Forest Practices Act, adopted in 1971 and effective in 1972, regulates harvest practices and other forest operations; for example, a certain number of trees are to be left unharvested in riparian areas, clear-cuts are limited in size, and harvested sites must be replanted. According to the Oregon Department of Forestry, this translates into a 6% loss in timber volume for Western Oregon and 2% loss in Eastern Oregon. Multiplying this loss by the 2.95 billion board feet of annual sustainable timber yield in private forests in Western Oregon and 471 million board feet in private forests in Eastern Oregon, as estimated by the Department of Forestry, yields

[12] We reviewed property listings from real estate listings throughout the coast and found an average value per running foot of roughly $5000 for developed land and $2200 for undeveloped land. We assume that 90% of the land is developed; therefore our weighted average value per running foot is $4700.

a total loss that can be multiplied by the average profit per thousand board foot (net of hauling and logging costs) to get an estimate of the average annual loss to property owners. Then properties changing hands after 1990 get subtracted from the compensation requirements because most of the Act's components were in place by then.

The Oregon Department of Forestry, in its submission to the Department of Administrative Services' fiscal impact committee, estimates that the total annual cost of compensation would be $55 million. Roughly half of this ($27.6 million) would be due to the Act's riparian protection component, $22.5 million would be due to protected resource sites, and $4.8 million would be due to the requirement to leave trees.

Since Measure 7 includes forest crops in the definition of "real property," this loss does not have to be converted into land value. It does, however, have to be converted into a lump-sum, one-time payment, discounted for the time value of money. At a 6% discount rate, the loss of value in perpetuity of the forest harvest would be $916.7 million.

URBAN GROWTH BOUNDARIES

Economic theory suggests, and several empirical studies support the conclusion, that growth controls affect land values. Knaap (1985) studied the impact of urban growth boundaries (UGBs) on land values both within and outside the Portland metropolitan boundary. He found that after the creation of growth boundaries, vacant land prices were significantly lower outside the boundary than within it[13]. Conversations with Portland-based planning officials and real-estate experts confirm Knaap's findings. In Portland, for example, land just *inside* the UGB is worth as much as 30 times the amount of land just *outside* the UGB. According to a Metro official, the land just inside the boundary, which is typically zoned for residential development, sells for about $150,000 per acre. The adjacent land outside the boundary, which is preserved as farm or forest land, sells for about $5,000 per acre. Under Measure 7, eligible landowners of property outside of the boundary could claim compensation for their loss in property values.

We calculate impacts for four metropolitan areas: Portland, Salem-Albany-Corvallis, Eugene-Springfield, and Bend. Our method proceeds as follows:

First, for each of the metropolitan areas, we define a so-called commuter shed (that is, a geographical area that captures the majority of the region's workforce). In Portland, we assume the commuter shed extends 22 miles from downtown, which reaches Boring to the east, Wilsonville to the south,

[13] See Knaap, Gerrit J. 1985. "The Price Effect of Urban Growth Boundaries in Metropolitan Portland, Oregon". *Land Economics*. 61:28-35.

Cornelius to the west, and St. Helens to the north[14]. The area consists of 728,724 acres (see Table 10). Smaller employment centers imply smaller commuter sheds. Therefore, we assume 15-mile commuter sheds in Salem, Albany, Corvallis, and Eugene and a 10-mile commuter shed in Bend[15].

Second, we subtract the amount of "urban" acreage currently designated in these areas. In the Portland metropolitan area, about 236,132 acres fall within the existing urban-growth boundaries. In the Salem-Albany-Corvallis area, we find 114,913 acres, which includes urban acreage in the three principal cities, as well as, acreage in a number of smaller towns such as Lebanon, Silverton, and Woodburn.

Third, we subtract acreage currently designated as rural residential, rural commercial or rural industrial. We make this deduction because—*if the UGB were lifted*—we believe the value of these lands may not change and could actually decline. In the time allowed for this study, we were unable to calculate precisely how much rural residential, rural commercial and rural industrial land falls within our four commuter sheds. However, we were able to obtain data at the county level and assumed that all the acreage reported for the relevant counties is located within the commuter sheds. For example, we assume *all* the rural residential, rural commercial, and rural industrial land in Multnomah, Washington, Clackamas, and Columbia counties (113,158 acres) falls within 22 miles of downtown Portland. This assumption overstates the actual amount of these lands that are in commuter sheds, and therefore, produces a lower compensation estimate.

By subtracting urban, rural residential, rural commercial and rural industrial land from the commuter shed's total acreage, we calculate the area's remaining land, which we assume to be farm or forest land. Some or all of these landowners would be compensated under Measure 7.

At this point, we turn to the calculation of claims. We assume courts would award higher compensation per acre to owners of land that is closer to the urban center. That is, farm or forest land adjacent to Portland's current UGB—about 12 miles from downtown—would be worth considerably more than land at the fringe of the 22-mile commuter shed. Specifically, we assume that—*absent the UGB*—the land just outside today's Portland's boundary would be worth $77,500 per acre.

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[14] The current boundary, although not perfectly circular, extends an average 12 miles from downtown Portland. Based on land-use patterns in Las Vegas, Houston and Phoenix, a Metro official believes that—absent the UGB—urban development might extend as far as 20 to 22 miles from downtown Portland.

[15] The size of Bend's commuter shed is limited by the Cascade Range and its transportation infrastructure.

Table 10: Claims Associated with Urban Growth Boundaries

	Acres	Land Value (per Acre) at Current UGB Boundary *Assuming UGB did not exist*	Land Value (per Acre) with Existing Farm/Forest Zoning	Avg. Claim (per Acre)	Unadj. Claims (in billions)	Adjust Claims for Tenure of Land Ownership (in billions)
Portland Metro						
22-Mile Commutershed	728,724					
Less Current Urban Land	-236,132					
Less Rural Res., Com., Ind.	-113,158					
Remaining Land	379,434	$77,500	$5,000	$18,412	$6.986	$3.493
Salem-Albany-Corvallis						
15-Mile Commutershed	602,930					
Less Current Urban Land	-114,913					
Less Rural Res., Com., Ind.	-72,875					
Remaining Land	415,142	$47,500	$5,000	$10,272	$4.264	$2.132
Eugene-Springfield						
15-Mile Commutershed	452,083					
Less Current Urban Land	-59,587					
Less Rural Res., Com., Ind.	-96,222					
Remaining Land	296,274	$47,500	$5,000	$10,584	$3.136	$1.568
Bend						
10-Mile Commutershed	200,926					
Less Current Urban Land	-30,980					
Less Rural Res., Com., Ind.	-72,852					
Remaining Land	97,094	$47,500	$5,000	$11,022	$1.070	$0.535

Source: ECONorthwest

We derive the Portland estimate as follows. A Metro official reports that residential land just inside the UGB is worth $150,000 per acre, while EFU land outside the boundary is worth about $5,000 per acre. A local real estate analyst deemed the estimates "reasonable". These values reflect today's conditions; however, we are interested in what the value of the land would be *assuming the UGB did not exist.* Without empirical data to derive such an estimate, we assume that—*without the UGB*—the land value would equal the average of these two values, or $77,500. So an eligible farmer holding land adjacent to the current UGB could claim compensation equal to $72,500 per acre (that is, $77,500 minus $5,000). This represents the highest claim per acre in the Portland area.

As we consider land further from downtown Portland, the claims per acre would decline, and—at the 22nd mile—there would no claim at all. Therefore, the average claims would fall somewhere between the maximum $77,500 at the 12th mile and $0 at the 22nd mile. The nature of our circular expansion dictates that a larger share of our new acreage will be closer to the 22-mile boundary than the 12-mile boundary. We take this into account in calculating an average per acre claim of $18,412[16]. Multiplying this average claim by the number of farm and forest acres (379,434), we calculate that gross claims would total nearly $7.0 billion in the Portland area if courts rule that Measure 7 is fully retroactive. However, if courts rule the measure is partially retroactive then courts would limit claims to only those owners that held their properties before the UGBs existed. Our research shows that 50 percent of landowners on the fringes of UGBs purchased land before 1980, which would reduce the estimated claims to $3.5 billion[17].

We repeat the exercise for the Salem-Albany-Corvallis, Eugene-Springfield, and Bend areas. We combine the analysis for Salem, Albany,

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[16] The mathematical formula used to estimate the total value of land contained within a ring with an inner boundary a miles from a city center and outer boundary b miles from a city center can be represented as $V = \int_a^b 2\pi t D(t) dt$, where V is the total land value contained within the ring, and $D(t)$ represents the mathematical function used to estimate land values at different distances from a city center. For this analysis, we have assumed that the land value function, $D(t)$, takes the form Ae^{-rt}, where A and r are parameters which can be calculated. Using this formulation, we have estimated what the total value of land outside the current urban growth boundaries of many cities would be *in the absence of an urban growth boundary* and subtracted from it the total value of that land with the an urban growth boundary in place.

[17] We arrived at the 50 percent assumption of pre-1980 ownership through a review of Metro's RLIS database. The database includes a field indicating the date the of most recent sale of properties in the metropolitan area. Analyzing only properties outside the UGB, we found 58 percent (weighted by acreage) had missing values in the sale date field and the remainder were sold in the 1980s and 1990s. We conclude that most of the properties with missing values were sold before 1980, which is also before county tax assessors began storing transaction information electronically. To allow for the fact that some of the missing values are related to properties sold in the 1980s and 1990s, we adjust our assumption downward from 58 percent to 50 percent.

and Corvallis areas because their 15-mile commuter sheds overlap. Applying lower per-acre land values, we estimate that claims—assuming partial retroactivity—would total $2.1 billion in the Salem-Albany-Corvallis area, $1.6 billion in Eugene-Springfield, and $0.5 billion in Bend.

RECENT RESTRICTIONS ON RURAL LAND DIVISIONS

The Oregon Department of Land Conservation and Development recently released new rules governing the subdivision of land in rural residential "exception areas." Roughly 89,000 acres of land that could have previously been allowed by County zoning to be subdivided into half-acre and acre lots can now only be subdivided into lots two acres or larger. Much of this land had already been subdivided into lots smaller than two acres, however, and houses are allowed on every existing lot, so not all these 89,000 acres are affected. Our analysis of rural residential land in Lane County shows that roughly 75% of the rural residential acreage in one-acre minimum zoning had already been subdivided smaller than two acres. Applying this to the 89,000 potentially affected acres in the state as a whole means that only 25% or 22,250 acres would be affected by this rule. This acreage can no longer be subdivided into 44,500 half-acre lots or 22,250 one-acre lots, but can only become 11,125 two-acre lots.

Generally, the more lots land can be subdivided into, the more valuable it is per acre (other things being equal). If a property cannot be further subdivided, the land retains some value as yards and other unbuilt space, but the value is typically lower than it would be if homes could be built.[18]

The value of land in rural residential areas is higher than most land outside UGBs because much more development is allowed to occur there than in land zoned for Exclusive Farm Use (EFU). We assume that the average minimum lot size before the new rural residential rule was one acre, and we assume a value per acre for one-acre parcels of $15,300 per acre.[19] Based on previous research in the real estate field, we estimate that the price per acre for two-acre parcels drops to $12,750 per acre.[20] Our estimate of loss in value is then the difference between the per acre values ($2,550), multiplied by the 22,250 affected acres. Our estimate of loss is therefore $56.7 million.

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[18] An exception is the case where lot sizes are too small for houses and their necessary on-site services like septic tanks and wells, and parcels uniting these smaller lots would be worth more per acre.

[19] This is the approximately the average value per acre of the 387 acres of rural residential land in Lane County and Linn County that is in parcels greater than two acres that are zoned for a one-acre minimum. In other words, this is the average per-acre value of land that would be impacted from a move from 1-acre to 2-acre zoning. These counties are assumed to be "average" counties in that property values are lower than those of the Portland metro counties but higher than those of eastern Oregon.

[20] Real estate research has estimated that the elasticity of price per-acre with respect to lot size is in the range of -0.133 to -0.367. See David Brownstone and Arthur De Vany, "Zoning, Returns to Scale, and the Value of Land," Review of Economics and Statistics. Vol. 73, No. 4, November 1991, pp. 699-704. See also Peter F. Colwell and Tim Scheu, "Optimal Lot Size and Configuration," Journal of Urban Economics, Vol. 26, No. 1, July 1989, pp. 109. Our assumptions of loss in value are based on the midpoint of this range (-0.25).

These calculations are shown in Table 11 below.

Table 11: Estimated Claims for Compensation Related to Rural Residential Subdivision Restrictions

Key Assumptions	
Acres Subject to Larger-Lot Subdivision Requirements	89,000
% Already Subdivided	0.75
Affected Acres	22,250

Min Lot Size (Acres)	Number of Lots Resulting	Value of Each Lot	Average Value per Acre	Total Lot Value	Change to 2-acre Value
2	11,125	$25,500	$12,750	$283,687,500	$0
1	22,250	$15,300	$15,300	$340,425,000	-$56,737,500

Source: ECONorthwest

ADJUSTING FOR LIKELIHOOD OF FILING

Our case study estimates stated above assume that all eligible landowners would file for compensation. However, it is reasonable to expect that less than 100 percent of eligible claimants would participate in the process. Some landowners would be unaware of their eligibility, and others may be aware of their eligibility but would forego filing a claim because the associated legal and time costs would be larger than their expected award. We would anticipate that the rate of participation would likely be higher for some regulations that lend themselves to class-action lawsuits.

We have no empirical evidence upon which to accurately predict the share of eligible landowners who would come forward to claim compensation. Therefore, in Table 12, we present some illustrative estimates of claims assuming participation at 100 percent, 75 percent, 50 percent, and 25 percent.

Table 12: Compensation Claims Adjusted for Likelihood of Filing (Assuming Partial Retroactivity)

Governmental Action	Total Eligible Claims	With 75% Filing	With 50% Filing	With 25% Filing
Recent Municipal Zoning				
Portland's Neighborhood Plan for SW	$8,296,376	$6,222,282	$4,148,188	$2,074,094
North Salem Downtown Plan	$2,700,108	$2,025,081	$1,350,054	$675,027
Salem Cell Tower Restrictions	$9,910,678	$7,433,009	$4,955,339	$2,477,670
Public Beach Access	$15,634,080	$11,725,560	$7,817,040	$3,908,520
Oregon Forest Practices Act	$916,700,000	$687,525,000	$458,350,000	$229,175,000
Urban Growth Boundaries				
Portland	$3,493,077,379	$2,619,808,034	$1,746,538,6	$873,269,345
Salem-Albany-Corvallis	$2,132,120,595	$1,599,090,446	$1,066,060,2	$533,030,149
Eugene-Springfield	$1,567,884,547	$1,175,913,410	$783,942,273	$391,971,137
Bend	$535,084,821	$401,313,616	$267,542,411	$133,771,205
Restrictions on Rural Land Divisions	$56,737,500	$42,553,125	$28,368,750	$14,184,375

Source: ECONorthwest

Conclusions

This report evaluates Ballot Measure 7, which, if passed, would require state and local governments to pay compensation when they enact or enforce a regulation that lowers the value of an owner's property by restricting its use. Specifically, we consider the types of regulations, rules, and goals that would be covered under the measure, as well as, the potential impact on the budgets of state and local governments.

With respect to the measure's scope, we identify 90 state and local government actions we believe could trigger compensation under the initiative. Comprehensive land-use plans, zoning ordinances, and subdivision ordinances are the most obvious candidates. The impact would extend beyond traditional land-use restrictions, however, because the initiative specifically defines property to include structures, minerals, forest products, and other crops. Consequently, building codes, safety regulations, and a variety of environmental regulations are also covered by the measure.

Given time and data constraints, our study considers the budgetary impacts associated with only a small subset of the rules and regulations that could trigger compensation under the measure. Specifically, we evaluate potential claims associated with the following regulatory actions: municipal zoning, public beach access, the Oregon Forest Practices Act, urban growth boundaries, exclusive-farm use zoning, and restrictions on rural subdivisions.

Text of Measure 7

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

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 the 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.

(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 filly 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.

Appendix B

Legal Opinion Related to Demand Constraints

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September 26, 2000

John Tapogna
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Re: Measure 7 Opinion

Dear Mr. Tapogna:

You have asked our opinion of the effect of Measure 7 on the amount of compensation owed to property owners whose property is affected by regulations. Particularly, you have asked our opinion as to the result of two hypothetical situations.

DEMAND CONSTRAINTS ON POTENTIAL DEVELOPMENT

In this hypothetical situation, there are four 80-acre parcels occupying each corner of a freeway interchange. Any of the four parcels could be developed as a regional shopping mall, but the current zoning of the property is for exclusive farm use (EFU).

Assuming that the property was zoned as EFU after its acquisition by the owner of Corner A, and that enforcement of the zoning regulation (i.e., denial of a Conditional Use Permit application) triggers Measure 7, the owner of Corner A brings a claim for compensation in court based on enforcement of the zoning change. The other property owners have not yet filed any claim for compensation.

Landowner A claims that his property has suffered a diminution of value equal to the difference of the market price between his property zoned as EFU and its potential use for a regional mall. Landowner A seeks the difference between $2,500 per acre as EFU and $100,000 per acre (hypothetical figures) as a commercial mall development. The regulatory body offers expert testimony that only one such mall could be supported at this corner and the mall could be built on any of the four parcels. The regulatory body argues, essentially, that Landowner A has only a one-in-four probability of developing the property as a regional mall, therefore, Landowner A is not entitled to the full benefit to the property of a regional mall. In addition, the regulatory body's expert testified that there are additional sites for a regional mall in the same market area, which further reduces the probability of Landowner A realizing the full value of a regional mall. Thus, the loss per acre should be discounted to $14,000.

Landowner A's attorney then argues that there is no evidence that the owner of the other three 80-acre parcels intend to build a regional mall, and even if any one of the four landowners could build a mall, then all of them should be compensated for that lost value, regardless of external market factors such as demand constraints.

The issue is whether the trial judge would be likely to allow the regulatory body's expert testimony.

OPINION

Assuming that Landowner A can establish a *reasonable probability* that he could build a regional mall in the immediate future, Landowner A would be entitled to the full diminution in value of the property between the regional mall and EFU status. We believe the trial judge would exclude expert testimony concerning any other properties' potential for use as a regional mall, and that the trial court would instruct the jury to award a diminution of value between the highest and best use of the property as a regional mall (as established by competent evidence) and the property zoned as EFU.

In Oregon, evidence of probability of future use of property is admissible under certain conditions. That evidence must relate to the particular property which is being taken or be offered in a manner which reasonably permits the application to that property alone. *State Highway Commission v. Compton*, 9 Or App 264, 269-70, 290 P2d 743 (1971).

> "Any competent evidence of matters, not merely speculative, which would be considered by a prospective vendor or purchaser, or which tend to enhance or depreciate the value of the property is admissible. The character, location, and physical condition of the real estate, and the use to which it is put, may be placed before the jury, and evidenced as admissible to show any probable use to which the land could reasonably be put, such as manufacturing, farming, railroad, or residential purposes, although it is not then being used for such purposes. However, speculative or remote ways in which the land could be used cannot be considered in determining its value."

Id. at 270-71; *see also State Highway Com. v. Bailey*, 212 Or 261, 307, 319 P2d 906 (1957). Further:

> "In determining the present market value of properties, it is not improper to consider the uses to which the property can be put in the future if the prospect of such uses is more than a speculative forecast and if the probability of such a future

> use would be reflected in the value which a present purchaser would attach to the property.
>
> * * *
>
> It is for the jury to decide whether the prospective use is reasonably probable, assuming, of course, that there is evidence upon which to base such an inference.

Compton, 9 Or App at 271; *State Highway Com. v. Arnold*, 218 Or 43, 57-58, 341 P2d 1089, 343 P2d 1113 (1959).

Finally, "the market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages * * * or its intrinsic character, it is peculiarly adapted to some particular use, all of the circumstances which make up this adaptability may be shown * * * ." *Compton*, 9 Or App at 273; *see State Highway Com'n v. Deal*, 91 Or 661, 668, 233 P2d 242 (1951).

Property owners are entitled to recover the difference between the present fair market value of the property for its highest and best use at the time of its taking (here, by regulation) and the remainder (here, the permitted, less valuable use). *Compton*, 9 Or App at 270; *Arnold*, 218 Or at 57. Landowner A could present expert testimony that the highest and best use of the property is as a commercial mall, and that he is entitled to the difference between the fair market value at the property's highest and best use (a commercial mall) and at a less valuable use (zoned as EFU).

It is our opinion that evidence of what the other three landowners might do or might be able to show is too speculative and remote to be relevant to the compensation for Landowner A's taking. The court's focus is on the specific property itself, in relation to the market for such a property. Landowner A might not be able to establish that his is a "unique property," but we do not believe the court would allow the regulatory body to try four cases in one; that is, to take evidence of the probability of the remaining landowners' development of their property, in order to show a reduced development potential for Landowner A's property. Similarly, the regulatory body could not offer evidence that other properties in the vicinity are also potentially suitable for a mall. As an aside, we note that if any landowner of the four parcels were to build a regional mall, under the hypothetical situation, expert testimony would not be able to establish that the remaining owners could build regional malls. However, with the zoning change, *none* of the landowners would be able to build a regional mall.

In summary, it is our opinion that Landowner A would be entitled to be compensated for the difference in value of the property as a commercial mall and the property's value under the more restrictive EFU zoning. Unfortunately for the public body, the remaining three landowners could, under this hypothetical situation, bring their own lawsuits to establish

the exact same value, *if* they could in fact establish a reasonable probability that they could develop the property into a regional mall in the near future. We believe that evidence of Landowner A's compensation would not be admitted into evidence in any of the remaining suits, nor would evidence of compensation to subsequent landowners be admissible in subsequent suits. Theoretically, under this hypothetical situation, *each* landowner would be entitled to the diminution of value of the property from a regional mall to EFU status.

DISCOUNTING FOR LIFE OF CURRENT USE

Under this hypothetical situation, Susan Smith has owned a convenience store along a busy arterial since 1994. The property was zoned for commercial use when she bought it, but the regulatory body subsequently rezones her property to single-family residential use only, thus "enacting" a land use regulation and triggering Measure 7. Ms. Smith's current use is now "grandfathered in;" that is, she is allowed to operate the convenience store so long as it remains in its current structure and neither she nor subsequent owners redevelop the property. Once the property is redeveloped, it must comply with the new residential designation. Ms. Smith files a lawsuit against the regulatory body, arguing that the change of zoning has lowered the value of her property from commercial use to single-family residential use. Ms. Smith offers evidence that the value of her land zoned for commercial use is $400,000, and the value of her land zoned for a residential value is $200,000 (hypothetical figures); therefore, $200,000 is owed to her for diminution of the fair market value of her property by the regulation.

The regulatory body argues that the judge must discount this figure to account for the fact that Ms. Smith's convenience store can continue its current use for 15 years (apparently based on expert testimony). Therefore, there would be no loss in value for 15 years, and the loss must be discounted to present net value, resulting in loss of only $84,000.

The issue is whether the trial judge would allow testimony of such a discount rate, and how the trial judge would instruct the jury to value the loss.

OPINION

The hypothetical is a little unclear in its assumptions. We do not know whether the $200,000 figure represents bare land value or includes the value of the ongoing business. Under Oregon law, the value of the property after the zoning change would include the value of the convenience store as a non-conforming use. We do not believe that the loss to Ms. Smith would be the entire difference between the property under commercial zoning and under residential zoning, since most judges would allow an appraiser to testify that the value of the property after the regulation includes the value of the non-conforming use. In essence, this is a type of discount in a different guise.

Assuming that the convenience store's value is included within the hypothetical reduced value, we believe that the majority of trial judges would not allow the discount evidence

as presented in the hypothetical, and would not instruct the jury to apply a discount rate to net present value. The answer to this hypothetical situation lies in a basic principle of Oregon condemnation law: "In condemnation proceedings, the condemnee is entitled to recover the present fair market value of the property for its highest and best use *at the time of the taking*." *Compton*, 9 Or App at 270; *State Highway Com. v. Assembly of God*, 230 Or 167, 177, 368 P2d 937 (1962) (emphasis added). Simply put, the measure of the diminution in value is before and after the taking, as of the time of the taking. Therefore, the regulatory body would not be able to argue that the diminution in value in fact occurs sometime in the future; i.e., when Ms. Smith actually redevelops the property. This rule corresponds with the expert testimony on value, which is based on factors such as (1) what Ms. Smith will be able to do in the future, even starting tomorrow if she so desired; and (2) what value a prospective purchaser would place on the property at the time of the taking. Ms. Smith would offer evidence that a prospective purchaser would offer her less money for the property because of the zoning change because the purchaser would not have the ability to develop the property differently. Ms. Smith could also offer evidence that it is reasonably probable that she will redevelop the convenience store in the near future following the taking, should she decide to do so. In addition, she could offer evidence that, should a fire occur at the convenience store and burn it to the ground, Ms. Smith's redevelopment of the property would require her to build not a convenience store, but a single family dwelling. Thus, she could argue that she has indeed lost, *at the time of the taking*, the difference in value of the property between two respective zoning uses. The City would counter that a prospective purchaser would take that risk into account.

A discount as stated in the hypothetical would be in violation of the rule that the property is valued at the time of the taking, not at some time in the future. We believe that the majority of trial judges would exclude such evidence. However, many trial judges would also allow expert testimony that the "after" value of the property includes the value of the non-conforming use, which is essentially another route to the same end – although Ms. Smith would recover some damages, the damages would likely not be the *full* difference in value between commercial and residential zoning.

Very truly yours,

Donald R. Stark

John R. Osburn

JRO:da

Appendix C

Legal Opinion Related to Retroactivity

MEMORANDUM RE BALLOT MEASURE 7

To: John Tapogna, ECO Northwest

From: Jeffrey G. Condit, Attorney at Law

Re: Ballot Measure 7

Date: September 29, 2000

You asked two questions regarding the interpretation of Ballot Measure 7 which is before the voters in the November 7, 2000, general election. (The text of Measure 7 is attached.)

INTRODUCTION

Measure 7 would amend Article I, section 18, of the Oregon Constitution. Article I, section 18 currently provides that "[p]rivate property shall not be taken for public use * * * without just compensation * * *." Oregon Courts have found that government regulation can effect a "taking" under Article I, section 18, but only where the regulation is so restrictive that it deprives the owner of "all economically viable use." *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 197-198, 935 P2d 411 (1997). This holding is similar to the federal court analysis of the "takings" clause in the 5th Amendment to the United States Constitution. See *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 798 (1992). Under current law:

> Inconvenience, reduction in profits or depreciation in the value of property that occurs as a result of a legitimate exercise of the state's police power is *damnum absque injuria* and not a compensable taking. *Schoonover v. Klamath County*, 105 Or App 611, 615, 806 P2d 156, *rev. denied* 311 Or 432 (1991).

Measure 7 would substantially change this body of law by requiring payment to a property owner when a government restriction on use of property reduces the fair market value by *any* amount.

METHOD OF ANALYSIS

The intended meaning of a constitutional provision is determined by applying the same interpretive methodology that is required for ascertaining the intended meaning of statutes. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559-560, 871 P2d 106 (1994); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378-79, 851 P2d 595 (1993). That methodology requires examination of the text and context of the statute and, if necessary, the legislative history and applicable canons of construction. *PGE*, 317 Or at 610-12. The history of a measure enacted by the voters includes the ballot title and other materials contained in the voters' pamphlet. *State v. Allison*, 143 Or App. 241, 251, 923 P2d 1224, *rev den* 324 Or 487, 930 P2d 852 (1996).

QUESTIONS

First Question Presented: Would Measure 7 apply to reductions in value caused by regulations enacted prior to the effective date of the measure and/or prior to the acquisition of property by the owner requesting compensation?

Short Answer: Measure 7 is ambiguous. However, the measure can be plausibly construed to require compensation for the impact of regulations adopted prior to the effective date of Measure 7 and prior to the acquisition of the property by the owner requesting compensation.

Discussion: The first half of the retroactivity question – whether Measure 7 would apply to regulations that pre-date the Measure[1] – is the easiest to answer. Section (a) states:

> 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 fair market value of the property. (Emphasis added).

The addition of "or enforces" as one of the two triggers for compensation is clearly intended to include regulations adopted in the past but enforced in the future. If the Measure had been intended to apply only to prospective regulations, "passes" would have been sufficient. Although new laws are generally applied prospectively, a new law will be applied retrospectively if such intent is clearly stated. *State v. Lanig*, 154 Or App 665, 670, 963 P2d 58 (1998). The text of the measure therefore answers the first part of the question.

The second question is more problematic because of the difficult wording of Section (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.

The first part of the sentence is susceptible to three different interpretations. It could be read as "[c]ompensation shall be due the property owner if the regulation was adopted or first enforced or applied after the current owner of the property became the owner." This makes some sense because, when referencing the implementation of law, "enforced" and "applied" are essentially two different ways of saying the same thing. This reading, however, requires changing the punctuation and adding a conjunction.

The second possible construction is "[c]ompensation shall be due the property owner if the regulation was adopted, first enforced, or first applied after the current owner of the property became the owner." This clarifies that the drafters intended to list a series of three alternatives. This reading, however, requires adding a second "first" and amplifies the redundancy of "enforced" and "applied."

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[1] If enacted, Measure 7 would go into effect on December 7, 2000. Or Const Article IV, section 1(4)(d).

The third possible construction is most grammatically compelling because it does the least violence to the sentence: "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." This reading clarifies that the drafters intended a series of three separate factors; "adopted," "first enforced," and "applied." It also creates a distinction between "enforced" and "applied" that would explain the addition of the second of those terms. Although this reading adds a comma for clarity, it does not change the sentence grammatically because it is equally correct to add or leave out the second comma when listing a series of three items. It is also consistent with the interpretative rule that courts should rely on the text of a law and not "insert what has been omitted" or "omit what has been inserted" (*see* ORS 174.010), and is consistent with the rule that the drafters would not have included different terms unless they intended different meanings. *Emerald PUD v. PP & L*, 79 Or App 583, 593, 711 P2d 179 (1985), *aff'd* 302 Or 256, 721 P2d 552 (1996). For these reasons, I conclude that this is the strongest of the three alternative constructions and apply it to the requirement for compensation in the measure:

Regulations "adopted * * * after the current owner of the property became the owner" clearly covers regulations enacted after the owner bought the property.

Regulations "first enforced * * * after the current owner of the property became the owner" is less clear, but appears to cover laws enacted prior to the acquisition of the property that first become enforceable or are enforced for the first time after acquisition. Such a reading would recognize that enactments of most local governments become effective 30 (most cities and counties) to 90 (Metro) days after enactment. That the drafters understood this delay in effective dates is indicated by the second part of Section (d), which gives a government body a 90-day grace period to repeal an offending measure before it becomes liable for compensation.

Regulations "applied * * * after the current owner of the property became the owner" is the most problematic. It could be read to apply to regulations that become applicable after an owner buys the property. Such a reading, however, would make the term functionally redundant to "first enforced," presumably not the intent of the drafters. In addition, it would have been very easy for the drafters to use "becomes applicable" instead of "is * * * applied" if that is what they had meant. A better reading is that this term is intended to cover existing regulations that are applied in a way that reduces value after acquisition of the property. For example, the mere existence of a wetlands protection ordinance (one of the specific regulations called out in the measure as potentially reducing value) may not impact the value of a particular property until a property owner applies to develop the property and is required by the applicable criteria to leave 40 percent undeveloped.

Such a reading properly gives effect to all three terms. *State v. Adams*, 315 Or 359, 365, 847 P2d 397 (1993). Measure 7 would cover diminution in value caused by regulations that are (1) enacted after a property owner buys a property, (2) enacted prior to but which first become effective after a property owner buys a property, and (3) in effect at the time that a property owner buys a property but which are applied thereafter in a manner that reduces value. Such a reading would also be contextually consistent with subsection (a), which is the first statement of the new constitutional right and does not limit the term "enforces" with a time restriction. Because the second part of Section (d) does not require the owner to file the application for compensation within any particular time period after a regulation that reduces value is applied, as

long as the owner is the "current owner," he or she can apply for compensation for an application of a regulation that reduced value at any time during his or her ownership.

This reading is not free from doubt. Measure 7 is not a model of legislative draftsmanship. The authors do not use terms consistently (for example, regulations are variously "passed," "enacted," "adopted," or "imposed"); dependant clauses join separate thoughts; and periods are employed with alarming infrequency.

If a reviewing court concludes that text and context do not answer the interpretative question and proceeds to legislative history – in this case, the ballot title and the voters pamphlet – further confusion ensues. The summary of the measure in the ballot title states that it "[a]pplies if regulation adopted after owner acquires property." This statement, without more, suggests that this is the *only* time the measure applies, which is directly contrary to what the measure actually says. The text and context of the measure itself would control, but if a court concludes that the text and context is ambiguous, it might rely on the ballot title to reach a more limited reading of the measure because that ballot title is the only explanation of the measure that many voters will read. (On the other hand, voters are presumed to fully read the measure and understand its legal context. *See Ecumenical Ministries*, 318 Or at 561-562.)

The explanatory statement supports my reading above. It states:

> Ballot Measure 7 requires payment to a landowner if an *existing or future regulation* is adopted, first enforced or applied after the current owner became the owner and still applies to the property 90 days after the owner seeks payment.

The drafters of the explanatory statement (which includes representatives of the chief petitioner) clearly state that the measure "requires payment to a landowner if an existing * * * regulation is * * * applied after the current owner becomes the owner * * *" in a manner that reduces value.

One final caution: The legislative history of an initiated measure includes the arguments in favor and opposed in the voters pamphlet. The 2000 Voters' Pamphlet has not yet been published, and so my analysis is made without the benefit of having reviewed those arguments.

For these reasons, my conclusion is that these sections of Measure 7 are ambiguous, but that the measure can be plausibly read to apply to regulations enacted prior to the effective date of the measure and to require compensation for existing regulations when applied to subsequent owners.

Second Question: How is value measured to determine diminution or compensation?

Short Answer: The measure is ambiguous, but it appears to envision application of the tests applicable to a condemnation action. Applying such tests, the measure of damages is likely to be the fair market value of the property if the regulation is *not* applied minus the fair market value of the property if the regulation *is* applied.

Analysis: Section (e) of Measure 7 defines "reduction in fair market value" as "the difference in fair market value before and after application of the regulation * * *." This definition does not by itself provide a tremendous amount of guidance. The Supreme Court has stated "[i]n

examining the text and context to determine the meaning of a constitutional provision adopted by the people by initiative or referendum, this court typically gives words of common usage their plain, natural, and ordinary meaning." *Coultas v. City of Sutherlin*, 318 Or 584, 588-89, 871 P2d 465 (1994). If, however, words used in a provision enacted by initiative or referendum have a well-defined legal meaning, the courts will give the words that meaning in construing the provision. *Cf. Gaston v. Parsons*, 318 Or 247, 253, 864 P2d 1319 (1994) ("[W]ords in a statute that have a well-defined legal meaning are to be given that meaning in construing the statute); *Ester v. City of Monmouth*, 322 Or 1, 9, 903 P2d 344 (1995).

"Fair market value" is the measure of damages for determining "just compensation" in a condemnation action under Article I, section 18, and ORS Chapter 35. *See Dept. of Trans. v Lundberg*, 312 Or 568, 574, 825 P2d 641, *cert denied*, 506 US 975 (1992). Given the use of the same term in a related context, a court is likely to conclude that the determination of "fair market value" in Measure 7 is intended to operate in the same manner as such a determination in a condemnation action. Further support for this reading is the Measure 7 definition of "real property," which includes structures, crops, and mineral rights. These items are also considered part of the real property and are not valued separately in a condemnation action. *Highway Comm. v Empire Building*, 17 Or App 616, 625-626, 523 P2d 584 (1974) (fixtures); *Pape v. Linn County*, 135 Or 430, 438, 296 P 65 (1931) (trees and crops); *Highway Commission v. Nunes*, 233 Or 547, 379 P2d 579 (1963) (aggregate and mineral deposits).

In a condemnation context, "fair market value" is defined as the amount of money the property would bring if it were offered for sale by an owner who desired, but was not obliged, to sell and was purchased by a buyer who was willing, but was not obliged, to buy." *Lundberg*, 312 Or at 574. Property must be valued at its "highest and best use," which is the use, at time of appraisal, that is the most profitable likely use of the property. This may be other than the property's current use if it is reasonably probable that the property has actual potential for a higher and better use. *Lundberg, id.* The determination of highest and best use must take into account existing zoning, but can also be based on reasonably probable future zoning changes. *See Unified Sewerage Agency v. Duyck*, 33 Or App 375, 576 P2d 816 (1978). Applying these standards to Measure 7, it is likely that a court would conclude that the "highest and best use" would be the most valuable likely use of the property if the offending regulation were not applied.

Two other condemnation concepts would likely come into play – "partial takings" and "special benefits." A partial taking occurs if only a portion of a parcel or less than fee title is condemned. This is the most analogous type of condemnation to a Measure 7 reduction in value. "Just compensation" in a partial taking is the fair market value of the portion or interest condemned, plus any reduction in the fair market value of the owner's remaining property caused by the taking. This is referred to as "severance damages." See *Lundberg, Id.* In a Measure 7 context, severance damages could be assessed if the effect of a regulation that impacts part of the property, such as a wetland or a stream corridor buffer zone, reduces the developability of the remainder of the property.

A "special benefit" is any enhancement to the value of the remainder property as a result of the taking, which is set off against the severance damage (but not against the fair market value of the property taken). *State Dept. of Trans. v. Montgomery Ward Dev.*, 79 Or App 547, 564, 719 P2d 507, *rev denied*, 301 Or 667 (1986). In a Measure 7 context, a local government might be able

to argue that the zoning restriction enhances the value of the remainder property and thereby reduces the amount of the taking. Such a benefit must be special to the particular property, however, and not something that benefits the public generally. *Hutchinson v. City of Corvallis*, 134 Or App 519, 523-524, 895 P2d 797, rev denied, 321 Or 512 (1995). This would limit the "special benefit" defense in a zoning context.

Just compensation in a partial taking is determined by applying the "before and after" test – i.e., just compensation equals the amount by which the fair market value of the entire property before the taking exceeds the fair market value after the taking. *La Grande v. Rumelhart*, 118 Or 166, 176, 246 P 707 (1926). Perhaps not uncoincidentally, "before and after" is the same phrase as used in Measure 7, Section (e), adding further credence to the argument that the drafters of Measure 7 intended condemnation concepts to apply. Applying the "before and after test" and the other condemnation concepts discussed above to a Measure 7 taking, the amount of compensation due the landowner would be the amount by which the fair market value of the highest and best use of the entire property not subject to the regulation exceeds the fair market value of the highest and best use of the property subject to the regulation, taking into account severance damages and special benefits.

Perhaps the most vexing ambiguity in Measure 7 is determining the date of valuation. Such a date is absolutely critical in order to obtain an appraisal and to make a valid comparison between appraisals. In a condemnation case, the date of valuation is the date on which the condemnation action is filed or the date on which the government enters onto and appropriates the property, whichever occurs first. *State Highway Com. v Stumbo*, 222 Or 62, 75-77, 352 P2d 478 (1960); *State ex rel Dept. of Trans. v Glenn*, 288 Or 17, 23, 602 P2d 253 (1979). Applying this analysis, it would seem that there are five possible dates of valuation under Measure 7: The date the offending regulation is "adopted," the date it is "first enforced," the date it is "applied," the date the owner applies for compensation, or the date 90 days after the owner's application for compensation if the regulation is still in effect. I believe that the best argument can be made for the date of application for compensation because this is the date upon which the right to compensation accrues and because this date also begins a 90-day "cure" period during which the government is given a last chance to avoid liability by repealing the offending regulation. The government does not fully "appropriate" the property value under the measure unless it fails to repeal. Applying *Stumbo*, it would seem the earlier date of application would therefore be the date of valuation, although there is almost an equally good argument for the first day on which the regulation affects the value of the property, whether that is when it is "adopted," "enforced," or "applied." If Measure 7 passes, implementing legislation may be necessary.

If you have any further questions, please do not hesitate to call.

Appendix D Qualifications of Principal Authors

JOHN W. TAPOGNA

M.P.P., Kennedy School of Government, Harvard University
B.A., Phi Beta Kappa, University of Oregon

John Tapogna is a research economist at ECONorthwest. He has provided economic, budgetary and analytic support to national, state and local level governments in the United States and overseas. Tapogna was a welfare analyst at the U.S. Congressional Budget Office where he forecasted the nation's welfare spending and estimated the cost of key congressional legislation. Most recently, he was the budget advisor for the municipality of Nogales, Chile while in the Peace Corps.

Analyses of Tax and Fee Policy

- **Analysis of Marginal Tax Rates in Wisconsin**. 1999. For Institute for Wisconsin's Future, Tapogna is developing a model to illustrate changes in government subsidies to a low-income family with children as the family's income rises. He will also estimate self-sufficiency budgets for families of differing size in each of Wisconsin's counties. The model reports the marginal tax rates facing low-income families as they make the transition from welfare to work.
- **Analysis of Marginal Tax Rates in Oregon**. 1998. For Children First for Oregon, Tapogna developed a model to illustrate changes in government subsidies to a low-income family with children as the family's income rises. Estimating self-sufficiency budgets for families of differing size in each of Oregon's counties. The model reports the marginal tax rates facing single mothers with children as they make the transition from welfare to work.
- **Evaluation of Financial Instruments Designed to Reduce Polluting Activities and Provide Stable Funding.** 1998. For the Oregon Department of Environmental Quality, ECO evaluated more than 40 taxes, user fees, and deposit schemes designed to reduce polluting activities by Oregon's businesses and citizens. ECO assessed each financing mechanism on the basis of five evaluation criteria: environment incentives, equity, administrative feasibility, revenue stability, and revenue size. Based on the assessment, ECO recommended a list of candidate fees and taxes to replace general-fund appropriations, which historically comprised a majority of the department's revenues. The candidate list included fertilizer and pesticide taxes, a carbon-based tax, and public-water-supply withdrawal fees.
- **Impact of Taxes on the Location Decision of International Businesses.** For the City of Tacoma, Washington and the Tacoma Empowerment Consortium, ECONorthwest estimated the likely response of international businesses to a 25-percentage-point decrease in the federal-corporate-income-tax rate. Through a survey of business executives and econometric analysis, ECO concluded that taxes play a role in a business' decision to locate or expand; however, they are less important than labor quality and costs. ECO estimated that banks and other financial institutions, which report high net incomes relative to total revenues, would be more likely to respond to a tax break than accounting, engineering, computer services, and law firms.
- **Projected Revenues Associated with a Regional Corporate Income Tax.** 1999. For a private client, Tapogna projected tax revenues associated with a regional

corporate income tax that would be assessed on businesses located in Multnomah, Clackamas, and Washington Counties, Oregon.

- **Analysis of the Municipal Budget**. 1992-1997. For the City of Nogales Chile, identified key trends underlying the growth in the city's debt, which equaled one-third of annual revenues in 1996. Recommended reductions in staff and private-sector subsidies to balance spending in 1997.
- **Financial Analysis of the Municipal Water and Sewage System**. 1997. For the City of Nogales, Chile, estimated the system's expenditures exceeded revenues by $50,000 annually.
- **Analysis of a Tax on Restaurant Meals**. 1989. For the City of Eugene, Oregon, forecast likely consumer response to a proposed 5 percent tax on restaurant meals. Analysis considered the effects on different categories of restaurants and the possible loss of customers to neighboring jurisdictions.

Analyses of Congressional Welfare Reform Proposals

- **Personal Responsibility and Work Opportunity Act-Dole/Packwood Welfare Reform** (as passed by the Senate Finance Committee in May 1995). Analyzed key Senate amendments to House version. Testified, before the committee, that states would encounter an annual $10 billion shortfall in funds to execute the work and training provisions of the bill and predicted states consequently would not comply with those provisions. Estimated the increase in future state spending on general assistance programs due to the proposed denial of federal cash assistance to legal non-citizens.
- **Personal Responsibility and Work Opportunity Act-Gringrich/Archer Welfare Reform** (as passed by the U.S. House of Representatives in March 1995). Estimated the effects on families and budgets of eliminating the Aid to Families with Dependent Children Program and replacing it with block grants paid to states. Reported the bill's five-year time limit on welfare benefits could reduce cash assistance rolls by 30 to 40 percent. Predicted that a reduction in cash assistance payments would result in more spending in foster care programs.
- **Senator Thomas Daschle's Welfare Reform Bill.** Analyzed the cost of a significant expansion in federal funding of child-care activities for recipients of welfare. Reported the bill would fail short of its promise to provide "universal" coverage to children in poor, single-parent families.
- **The Work and Responsibility Act of 1994**. President Clinton's Welfare Reform Bill (as introduced in the U.S. House of Representatives). Estimated that the President's proposed expansions of work, training and child care activities would cost the federal government $11 billion over the 1995-2000 period, which was $2 billion more than had been estimated by the U.S. Office of Management and Budget (OMB). Concluded OMB had overestimated the long-term savings associated with its training investments and child support enforcement provisions. Oversaw the development of a model that simulated receipt of welfare benefits across time, which was key in estimating the bill's main provision.
- **Senator Robert Dole's Welfare Reform Bill**. Estimated costs and long-term welfare savings of an expansion of the federal welfare-to-work training program known as JOBS. Based on an exhaustive review of published studies, calculated

that each $1 invested in such activities would yield $0.70 in reduced AFDC payments over the subsequent five years.

- **Representative Rick Santorium's Welfare Reform Bill**. Calculated the number of recipients who would be affected by the bill's two-year time limit on welfare payments using administrative data from the U.S. Department of Health and Human Services. Estimated a typical training slot costs the government $6,000 annually in supervisory and child care expenses.
- **Senator Bill Bradley's Child Support Reform Bill**. Forecast the long-term welfare savings associated with improvements to the federal child support enforcement system, including the creation of a national registry for newly hired workers and the expansion of hospital-based paternity establishment programs.
- **Omnibus Reconciliation Act of 1992**. Forecast increased federal spending due to a proposed reduction in the required state match rate for the Job Opportunities and Basic Skills training program (JOBS).
- **President Bush's Fiscal Year 1993 Budget**. Estimated cost and caseload effects of welfare legislation contained in the FY 1993 budget, which proposed an increase in the amount of assets that could be held by welfare recipients and a program that would benefit recipients who formed small businesses.
- **Representatives Thomas Downey and Henry Hyde's Child Support Assurance Proposal.** Co-developed a simulation model, based on the Census' biennial child support survey that predicted costs of a variety of child support assurance proposals.

Additional Analyses

- **Budgetary and Economic Implications of a Food Stamp Outreach Program**. 1998. For the Oregon Center for Public Policy, estimating the federal and state cost of a program to increase Food Stamp participation among elderly, working-poor, and non-English speaking populations. Developing a method to estimate the local employment impacts for food stamp spending.
- **Analysis of Work Incentives and Self-Sufficiency Budgets in Oregon**. 1998. For Children First for Oregon, developing a model to illustrate changes in government subsidies to a low-income family with children as the family's income rises. Estimating self-sufficiency budgets for families of differing size in each of Oregon's counties.
- **Benefit-Cost Analysis of New-Hire Reporting Program**. 1998. For the U.S. Department of Health and Human Services, assisted in the evaluation of the costs and benefits of a New-Hire Reporting Program. The program is expected to increase child support collections and reduce spending in welfare and unemployment programs.
- **Nationwide Review of Child Support Financing Issues**. 1998. For the U.S. Department of Health and Human Services, assisted with a survey of child support directors to determine how states and localities fund child support enforcement activities. The study addresses the use of federal incentive payments and retained welfare collections as sources of the state and local share of costs.

- **Analysis of Cash Assistance Caseloads and Poverty Populations in Oregon**. 1998. For the Oregon Center for Public Policy, compared the state's cash aid population to its poverty population during 1969-1997. Findings were reported in the *Portland Oregonian*, Eugene *Register Guard* and Salem *Statesman Journal*.
- **Workforce Demonstration for Non-Custodial Parents**. 1998. For the Urban League of Portland, collaborated in the design of training model for non-custodial parents of children who receive cash assistance. Reviewed similar programs operating in six sites across the country and estimated likely participation rates in the Portland area. Negotiated state approval of innovative program designs, which would partially forgive child support debts owed to state and suspend child support arrearages when non-custodial parents were unable to find work.
- **Costs and Benefits of Rural Electricity Projects**. 1997. For the Cities of Nogales and Catemu, Chile, estimated the net present value of electricity projects to determine the appropriate mix of public and private-sector financing.
- **Costs and Benefits Associated with Alternatives to Incarceration**. 1991. For the Michigan Department of Management and Budget, analyzed policies such as electronic-monitoring and heavily supervised probation as alternative punishments for criminals with no history of violence.
- **Market Analysis for a Shopping Center Development**. 1989. For the Cities of Albany and West Linn, Oregon, authored section of analysis outlining national trends in retailing, including the emergence of hyper-markets and revitalization of specialty malls in urban centers.

Presentations

Using Population Projections in the Local Planning Process (in Spanish). U.S. Peace Corps Conference on Municipal Management. May 1997. Olmue, Chile.

The Effect on States' Budgets of Work and Training Provisions in the Personal Responsibility and Work Opportunity Act. Testimony before the U.S. Senate Finance Committee. May 1995. Washington, D.C.

Welfare Block Grants and How They Will Affect State's Budgets. Presentation at a meeting sponsored by the National Governors' Association. Spring 1995. Washington, D.C.

Estimated Cost and Effects of Congressional Child Support Reforms. Presentation at the Association for Public Policy Analysis and Management 1994 Conference. October 1994. Chicago, IL.

An Analysis of the President's Child Support Enforcement Proposals. Presentation at the Annual Meeting of the American Public Welfare Association. Fall 1994. Washington, D.C.

Why Ending Welfare As *We Know It Will Cost Money.* Presentation at the American Enterprise Institute's 1993 Welfare Forum. December 1993. Washington, D.C.

Welfare Reform and the Federal Budget. Presentation at the Urban Institute Roundtable on Welfare Reform. December 1992. Washington, D.C.

Demographic, Economic, and Policy Factors Underlying the Recent Growth in Families Receiving Aid to Families with Dependent Children. Presentation to the Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services. November 1992. Washington, D.C.

Demographic, Economic, and Policy Factors Underlying the Recent Growth in Families Receiving Aid to Families with Dependent Children. Presentation at the Annual

Conference of the Association for Public Policy and Management. October 1992. Denver. CO.

Budgetary Effects of the Interstate Child Support Commission's Recommendations. Presentation at the Annual Meeting of the American Public Welfare Association. Fall 1992. Washington, D.C.

Papers

The Administration's Welfare Reform Proposals: A Preliminary Cost Estimate, with Julia Isaacs and Dorothy Rosenbaum. CBO Memorandum, November 1994. U.S. Congressional Budget Office. Washington, D.C.

Estimated Cost and Effects of Congressional Child Support Reform CBO Draft Paper presented at the Association for Public Policy Analysis and Management Annual Conference, October 1994. U.S. Congressional Budget Office Washington, D.C.

Demographic, Economic, and Policy Factors Underlying the Recent Growth in Families Receiving Aid to Families With Dependent Children, with Janice Peskin. CBO Memorandum presented at the Association for Public Policy Analysis and Management Annual Conference. September 1992. U.S. Congressional Budget Office. Washington, D.C.

Assessing Welfare Clients for Work, Education, and Training Activities, with David Farnsworth. John F Kennedy School of Government Policy Analysis Exercise completed for the Massachusetts Department of Public Welfare. April 1991. Harvard University. Cambridge, MA.

TERRY MOORE

M.U.R.P. Urban and Regional Planning, University of Oregon
M.A. Public Administration, University of Oregon
B.S. Environmental Engineering, Stanford University

Terry Moore has been a vice president and project manager at ECONorthwest since 1979. He has managed over 250 projects in land-use and transportation planning, policy analysis, and market analysis for private and public clients. Moore is a member of the American Institute of Certified Planners and an adjunct professor in the Department of Planning, Public Policy, and Management at the University of Oregon.

Moore has managed several projects for the TGM Program as well as projects relating to the economic and land-use impacts of light rail transit, land-use alternatives, and the impacts of new highway corridors and transit improvements. He has managed analyses of transportation-financing alternatives and multi-modal planning for Corvallis, Woodburn, Florence, Astoria, Scappoose, Sutherlin, Reedsport, and Grants Pass, as well as for the I-5/Highway 217 Subarea Plan. He is working on congestion-pricing and least-cost planning projects in Oregon, Washington, Colorado, and New Jersey, as well as for the FHWA on a framework for efficient transportation policy and Major Investment Studies in Metropolitan Planning Organizations.

Moore is working to help local jurisdictions develop guidelines for land-use and design to encourage transit- and pedestrian-oriented development. Moore was a contributor to the Urban Land Institute book *Growth Management: Keeping on Target?* (1985). Moore's work in land use and transportation led to a request from the American Planning Association for a book on the topic, published in 1994 as *Understanding the Transportation/Land-Use Connection,* that describes a framework for planners and policymakers to use when trying to develop integrated land-use and transportation policies.

Transportation

- Funding alternatives for Transportation System Plan, ODOT for various cities
- Effects of land-use and demand management policies on trips, Oregon Road Finance Study, Oregon Department of Transportation (ODOT)
- Land-use and economic impacts for EISs for various highway and bridge projects, including Portland's Sunrise Corridor and Western Bypass, ODOT
- Land-use and policies for transit-oriented development and market analysis for real-estate products at light-rail transit stations, Portland Tri-Met and Metro, City of Hillsboro, Washington County

Land Use

- Analysis of development patterns, ODOT TGM, Portland Metro and LCOG
- *Region 2040*: a regional plan for metropolitan Portland and evaluation of no-growth and slow-growth policies for metropolitan areas, Portland Metro
- Urban form and transportation in Portland metropolitan area, Portland Tri-Met
- Urban growth management policies, statewide evaluation and case studies, Oregon Department of Land Conservation and Development
- Comprehensive land-use plans and growth management policies, various cities

JAMES EBENHOH

M.A. Public Policy and Urban Planning, Harvard University
Graduate Diploma, University of Otago, Dunedin, New Zealand
B.A. *magna cum laude*, Social Studies, Harvard University

James Ebenhoh is a policy analyst with ECONorthwest. He is knowledgeable in land use, transportation, economic development, public finance, and urban planning issues. He also has experience in urban and social geography, urban sociology, and housing policy. Ebenhoh has managed feasibility studies, conducted research on a wide range of policy and planning issues, written reports on demographics and social issues, provided policy advice to local and federal government, and recommended strategies for accessing funding sources.

Representative Projects

- Feasibility study for development of technology center, including business incubator and community college facilities, Port of Hood River, Oregon.
- Calculation of infrastructure costs for alternative development scenarios in the Willamette Valley, 1000 Friends of Oregon.
- Review of charge-out rates for public works staff, City of Eugene, Oregon.
- User fee study for Building Codes and Dog Control Divisions, Clackamas County, Oregon.
- Estimation of the economic benefits of homeownership and market analysis of the potential for new homeownership in various U.S. cities, Neighborhood Reinvestment Corporation, Washington, D.C.
- Analysis of geographic distribution of federal spending for bicycle and pedestrian projects, Rails-to-Trails Conservancy, Washington, D.C.
- Assistance to the Malden Redevelopment Authority in redeveloping a 200-acre brownfields site in suburban Boston into a telecommunications park.
- Feasibility study for a teleport development, Malden Redevelopment Authority, Malden, Massachusetts.
- Assessment of housing needs among disadvantaged groups and recommendation of new housing policy, Dunedin City Council, Dunedin, New Zealand.
- Formulation of city-wide bicycling plan, waste management plan, and property tax abatement policy, Dunedin City Council, Dunedin, New Zealand.
- Coordination and production of older persons policy in partnership with citizens and community groups, Dunedin City Council, Dunedin, New Zealand.

Publications

"The Promise of Pathways: An Analysis of the Geographic Distribution of Federal Funding for Bicycle and Pedestrian Projects Under the ISTEA Legislation, 1992-1997." Master's thesis, John F. Kennedy School of Government, Harvard University.

"Gateways and Barriers: Racial Housing Segregation in the Suburbs of Cleveland." Undergraduate thesis, Harvard University.

Presentations

"The Promise of Pathways: An Analysis of the Geographic Distribution of Federal Funding for Bicycle and Pedestrian Projects Under the ISTEA Legislation, 1992-1997." Presented at *Making the Connection II*: Second Annual International Trails and Greenways Conference, Pittsburgh, Pennsylvania, June 1999.