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Questions and Answers about Oregon's Land Use Program:

"Takings" & Compensation

Q: *What is a "taking"?*

A: *According to the U.S. Supreme Court, a "taking" is a government action that either physically occupies property or removes nearly all of its economic use.*

The term "takings" comes from the Fifth Amendment of the U.S. Constitution, which states: "nor shall private property be taken for public use without just compensation." Oregon's Constitution has a similar requirement. A "taking" is considered to have occurred when government takes actual, physical control of private property. This language is intended to protect the rights of property owners, while still allowing the government to take private property for public uses, such as building roads, dams, and parks in exchange for payment.

Over the last 100 years, court cases have explored what happens when government does not physically take land, but restricts its use through regulation. *Lucas v. South Carolina Coastal Council* (1992) established that when a regulation goes so far as to deny all economic use of property, it will also generally be considered a taking and trigger the Constitution's payment requirement.

Ignoring this century of case law, compensation advocates often argue the issue is simply about enforcing the Constitution. Their real agenda is to expand the concept of "takings" far beyond the original constitutional intent or court interpretation, and beyond what any other state has done – to include payment to property owners for *any* possible negative financial impact from a regulation.

Q: *Shouldn't government pay when its actions hurt speculative property values?*

A: *If government were subject to lawsuits asking it to pay for every hypothetical economic impact its actions caused, our ability to protect public health, safety, property rights, and the environment would grind to a halt.*

Clean air standards, for instance, require most of us to have our vehicle emissions checked. If government had to compensate each of us for the time required to comply, we certainly could not afford to enforce clean air standards. It could cost state and local governments billions of dollars to pay all property owners for every possible financial impact of regulations, depending on how valuations are made.¹ For example, every person prohibited from building a cell phone tower would have to be paid for the loss of potential income, a cost in the billions of dollars.² Yet those

regulations benefit other property owners, whose views are protected.

In a democratic society, there is nothing unusual or inappropriate about choosing to regulate activities which are harmful to society; for example, we limit mining operations near urban areas. This type of regulation has happened for millennia, though primarily through zoning restrictions in the past century. Past and current judicial interpretations of the Constitution support such restrictions, and find payment is due only when nearly all economic use of the property is eliminated, and the property owner has no use of their property.

Furthermore, most regulations actually produce a benefit for the property owner as well as the surrounding community; for example, regulating the location of a heavy trucking operation minimizes residential impacts and protects residential property values. All properties benefit from the assurance that incompatible property uses will not occur or will be mitigated. This benefit, along with other benefits enjoyed by the property owner such as subsidies, tax advantages, and provision of government services and infrastructure, should be balanced against any "burden" allegedly imposed by the regulation.

Q: *Would proposed compensation measure (initiative petition #36) consider the "givings" as well as the "takings"?*

A: *No. Current proposals make no provision for actions by government and taxpayers that increase property value.*

Taxpayer-financed improvements such as highways, water, and sewers greatly increase the value of certain lands. It is no accident that shopping centers are built next to taxpayer-financed freeway interchanges; these improvements created the traffic which made the site desirable (and valuable) for private investment. But current compensation proposals, including initiative petition #36, do not provide any compensation to taxpayers for the value their tax dollars have already added.³

Q: *Would the proposed compensation bill help me if some neighboring land use reduces my property value?*

A: *No. Proposed "takings" legislation does not take into account the impacts to neighboring properties from bad land use decisions or lack of regulatory enforcement.*

For example, if a local land use board chooses not to restrict a

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developer from filling in a wetland, causing more flooding elsewhere, the flooded neighbors would not be eligible for compensation. Current proposals ignore the impact of development on communities. Local governments could find themselves in a lose-lose situation if a developer wants to build a strip mall that would cause traffic jams. Under current proposals, even the community's ability to require the developer to make the needed street improvements could be challenged, leaving local communities without the tools they need to manage growth and maintain livability. The current proposals are unfair because they require payment only for loss of value due to a restriction on use – not for loss of value from incompatible or detrimental uses that impact neighboring properties and taxpayers.

Q: *Does 1000 Friends support proposed “takings” or compensation legislation?*

A: *No. 1000 Friends cannot support current compensation proposals because they do not consider fairness to taxpayers, neighboring properties, communities, or future generations.*

Current proposals are likely to make land use and environmental laws impossible to enforce, will generate costly new layers of bureaucracy, and will certainly cost Oregon taxpayers far more than they can possibly afford. 1000 Friends continues to support on-going efforts to improve our land use planning system so that it works for individual property owners, communities, and future generations in a way that is fair to all parties. If a regulation is unnecessary, objectionable, or unconstitutional then it should be amended. We shouldn't have to pay developers simply to obey the law.

Q: *Who does support these compensation bills?*

A: *In Oregon, most of the financial and political support for sweeping compensation measures has come from Oregonians in Action and Bill Sizemore's organization, Oregon Taxpayers United (now Oregon Taxpayers Union.)*

Other significant supporters include realtors, home builders, developers, and national anti-government groups.

Q: *Who opposes these bills?*

A: *A wide cross-section of citizen interest groups, elected officials, and community leaders.*

Many interest groups have opposed efforts to create sweeping “takings” laws that would paralyze communities. Those groups include state, county, and city elected officials, religious organizations, neighborhood associations, conservation groups, taxpayer watchdog groups, labor unions, and many academic and legal scholars.

Q: *Isn't zoning land for farm or forest use an unconstitutional taking?*

A: *No. A regulation becomes a “taking” if it denies a property owner any economically viable (or “substantially beneficial”) use of property. The use of land to grow crops, livestock or timber is a beneficial, economic use.*

Existing land use regulations protecting farm and forest lands allow people to use their property for farming and forestry. In addition, for the last 20 years, Oregon's laws have allowed landowners to build a dwelling on parcels in exclusive farm use (EFU) zones if the land was generally unsuitable for crops or livestock. Most owners who acquired EFU land before 1985 and do not have a home are now allowed to build one under “lot-of-record” provisions.⁴ These provisions apply to the approximately 12 million acres of land in EFU zones that is not classified as high value farmland (about 75% of the total in EFU zones). Finally, farm and forest lands are given preferential tax status, meaning those land owners are being compensated for limits on development.

Q: *Does 1000 Friends support private property rights?*

A: *Yes. One of the most important reasons for having land use laws is to protect property rights and values.*

Some people consider planning and land use laws to be an attack on property rights and property values. But one of the fundamental reasons for adopting such laws is to protect property rights and values. Residential zoning, for example, protects homeowners from the conflicts and losses of value that surely would occur if factories, landfills, quarries, or wrecking yards were allowed to develop in the midst of neighborhoods.

Protection of property rights and values is, of course, not the only reason for a community to adopt planning and land use laws. Such laws also help a community manage public service systems efficiently; promote economic development; conserve natural resources; give citizens a voice in community land use policies; and save tax dollars. But the oldest and, arguably, most important reason for land use laws is to protect property investments and property values.⁵

Sources:

¹ The Measure 7 fiscal impact statement estimated costs at \$1.6 billion/year for state government and \$3.8 billion/year for local governments. Voters' Pamphlet, Nov 7, 2000, Vol 1, page 309.

² Fiscal Impacts of Ballot Measure 7 on State and Local Governments: An Analysis of Selected Regulations, ECO Northwest, October 2000.

³ A common argument, that we recover such gains through increased taxes, is a chimera: if that were true, those subject to “takings” would be satisfied with decreased taxes due to decreased property value.

⁴ HB 3661 was passed in 1993. It is encoded at ORS 215.700

⁵ Paraphrased testimony of Mitch Rohse, House Environment and Land Use Committee, January 28, 2003. See also Donald Rypkema talk, www.law.georgetown.edu/gelpi/takings/rypkema.htm

Additional fact sheets on other land use planning issues are available from 1000 Friends. For more information, visit www.friends.org.