

February 13, 2001

**No. 8277**

This opinion is issued in response to questions from Governor Kitzhaber concerning Ballot Measure 7, which was proposed through an initiative petition and approved by the people at the general election held on November 7, 2000.<sup>i/</sup> Measure 7 amended Article I, section 18, of the Oregon Constitution to require state and local governments to pay compensation to property owners if a government regulation restricts the use of their property in a manner that reduces its value.<sup>ii/</sup>

### **FIRST QUESTION PRESENTED**

Do any state agencies have authority to adopt rules governing the procedures for claims against the state under Measure 7, or is legislation required? Specifically, may agencies adopt rules addressing: (1) the proper form and content of a claim, (2) the time limitations within which a claim must be filed, (3) where a claim must be submitted, (4) the adjudication of claims, and (5) the substantive interpretation of Measure 7?

### **ANSWER GIVEN**

The Department of Administrative Services (DAS) has authority to prescribe forms and procedures for claims for payment from moneys in the State Treasury. ORS 293.306. DAS's authority encompasses claims for compensation under Measure 7, but it is limited to establishing procedural requirements that do not require substantive interpretation of Measure 7. Within this restriction, DAS may adopt rules specifying the proper form and content of a claim against the state, including a requirement that the claimant provide evidence sufficient to support the elements of the claim.

DAS may specify the agency with which a claim must be filed, although under current law, this agency must either be DAS or the agency responsible for adopting or enforcing the regulation at issue in the claim. The time limitation for filing a claim against the state is

established by ORS 293.321; DAS may not adopt an inconsistent rule. DAS has the authority to adopt rules that establish an adjudicatory process for Measure 7 claims.

If DAS exercises its authority under ORS 293.306 to prescribe forms and procedures for Measure 7 claims, the use of such forms and compliance with those procedures will be mandatory. ORS chapter 293 does not cover all of the issues that will be relevant to Measure 7 claims.

## SECOND QUESTION PRESENTED

Under Measure 7, compensation is due to a property owner only if there is a government “regulation” that “restricts the use of private real property.” The Measure does not 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.”

(a) What is a “regulation”?

(b) When does a regulation “restrict[ ] the use of private real property”?

(c) Does the exception for regulations that prohibit the use of property for “selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor” mean that regulations that merely restrict those same activities require compensation?

## ANSWER GIVEN

(a) For purposes of Measure 7, a “regulation” is any law, rule, ordinance or other enforceable legislative or quasi-legislative action of government. A “goal” or “resolution” is a regulation only if it is enforceable.

(b) A regulation “restricts the use of private real property” under subsection (a) of Measure 7 if it permanently or temporarily: (1) limits or bars the exclusive right of the owner to possess or dispose of the property, (2) limits or bars the purposes for which property may be employed or occupied, including prohibitions of particular uses as well as limitations on the circumstances in which a particular use may be established or expanded, (3) limits or governs the physical extent to which or the conditions under which property may be employed (whether generally or for a particular purpose), or (4) limits or bars the benefit or profit arising from the employment or occupation of the property.

Regulations that burden the use of property but that do not directly limit or prescribe what uses are allowed or how allowed uses are carried out, such as *ad valorem* taxes, general laws governing occupations without regard to how private real property is used, and other civil and criminal laws that generally prohibit or restrict a person’s *conduct* not involving the use of property, do not come within subsection (a) of Measure 7 even if they may affect or place a burden on private property owners.

(c) The exception from compensation for a regulation that prohibits the use of property for “selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor” covers only those regulations that expressly prohibit the use of property for those activities. Regulations that merely restrict those same activities are not within the exception.

### **THIRD QUESTION PRESENTED**

Subsection (a) of Measure 7 creates a right to compensation when state or local “government passes or enforces a regulation” that restricts the use of private real property in a manner that reduces its value. Subsection (d) of Measure 7 states that compensation is due if the regulation “was adopted, first enforced or applied” after the current property owner became the owner and if the regulation “continues to apply to the property” 90 days after the owner applies for compensation.

(a) Does Measure 7 create a right to compensation for government actions taken before the effective date of Measure 7?

(b) What types of government action come within the phrase “government passes or enforces a regulation” in subsection (a) of the Measure?

(c) Does Measure 7 create a right to compensation if, after the effective date of Measure 7, the government “enforces” a regulation that “was adopted” before the effective date of Measure 7?

(d) Under what circumstances will the requirement in subsection (d) of Measure 7 that the regulation “was adopted, first enforced or applied after the current owner of the property became the owner” be met?

(e) What is the meaning of the phrase “continues to apply to the property” in subsection (d) of Measure 7?

(f) If a regulation requires an owner to apply to the government for authorization for the desired use of the property, must the owner complete the government’s application process before the owner has a claim for compensation?

### **ANSWER GIVEN**

The text of subsections (a) and (d) of Measure 7 must be read together so as to give effect to both provisions. Subsection (a) establishes which government actions create a potential right to compensation, and subsection (d) establishes the conditions necessary for that potential right to be exercised by a particular current owner of private real property.

(a) Measure 7 does not create a right to compensation for government actions taken before the effective date of the Measure. Government must either pass or enforce a regulation after the Measure's effective date.

(b) Two types of government action come within the phrase "government passes or enforces" in subsection (a) of Measure 7. Government "passes" a regulation when it enacts or approves the regulation. Government "enforces" a regulation when it acts in any way to give force or effect to the regulation in question by any means other than adopting or passing the regulation. The government may give effect to a law in a wide variety of ways, not all of which necessarily involve direct compulsion. For purposes of subsection (a), once government "enforces" the regulation as to any property, the owners of all properties subject to the regulation have a right to compensation if they satisfy the conditions of subsection (d) of Measure 7.

(c) Measure 7 creates a right to compensation for the enforcement of regulations adopted before the effective date of Measure 7 if the act of enforcing those regulations occurs after the Measure's effective date.

(d) If the current owner of a property became the owner before the regulation was adopted, the owner will qualify for compensation under the first part of subsection (d) of Measure 7. While the answer is not free from doubt, we believe that if the current owner of a property became the owner after the regulation was adopted, the owner will qualify for compensation only if the owner became the owner before the regulation was "first enforced or applied" as to *any* property subject to the regulation.

(e) The phrase "continues to apply to the property" means that the regulation is still in general legal effect and is capable of being enforced as to the property either by the government or, where the law includes a means for a third party to require compliance with the regulation, by a third party.

(f) Measure 7 requires compensation only to the extent a regulation actually restricts the use of private real property and that restriction reduces the value of that property. If a regulation requires a property owner to apply to the government for authorization for the desired use of the property, the owner may seek compensation under Measure 7 at any time, but the decision when to file a claim may affect the extent of actual restrictions and thus the amount of compensation that would be due. For example, if a regulation, on its face, definitively prohibits particular uses, limits uses or imposes conditions on uses, an owner need not complete an application process in order to establish that these restrictions exist. And an owner does not need to complete the government's application process in order to seek compensation based solely on the restriction of having to apply for authorization. If government *may* restrict the use depending on the outcome of an application process involving governmental discretion, however, the owner must complete that process in order to establish that there is a restriction on use beyond the mere requirement to apply for authorization.

#### **FOURTH QUESTION PRESENTED**

Who is a “property owner” who may be paid compensation under Measure 7?

#### **ANSWER GIVEN**

For purposes of Measure 7, the “property owner” who may be paid compensation is the owner of the land.

#### **FIFTH QUESTION PRESENTED**

Measure 7 requires the state to pay compensation to a property owner when specific requirements are met.

(a) Which state agency(ies) may pay a Measure 7 claim?

(b) May Measure 7 claims be paid with funds appropriated for the payment of tort claims or the state’s condemnation of private property?

#### **ANSWER GIVEN**

(a) A state agency with authority to promulgate or enforce a regulation that provides the basis of a Measure 7 claim has authority to pay that claim, even if it does not receive an appropriation specifically for that purpose, as long as the agency has funds available to it that may be spent to pay such claims without violating some clear and explicit prohibition in its appropriation and the funds needed for payment are available within the agency’s allotment for the applicable quarter.

(b) Appropriations made for payments under the Oregon Tort Claims Act and the state’s condemnation statutes are not available to pay Measure 7 claims.

#### **SIXTH QUESTION PRESENTED**

Under subsection (d) of Measure 7, compensation is due a property owner if the regulation restricting the use of the owner’s property “continues to apply to the property 90 days after the owner applies for compensation.”

(a) Under what circumstances, if any, may a state agency whose regulation is the subject of a Measure 7 claim opt not to enforce the regulation in order to avoid liability for that claim?

(b) If an agency may forego enforcement, are there any constraints on its decision to do so?

## **ANSWER GIVEN**

(a) A state agency may forego enforcement of regulations restricting the use of private real property if the agency's rules and enabling statutes give it discretion to do so.

If a state agency's enabling statutes or rules do not give the agency discretion to forego enforcement of a regulation restricting the use of private real property, the agency must enforce that regulation as long as it has money within its appropriation and allotments to pay valid Measure 7 claims. An agency must include in its allotment estimate an amount for valid Measure 7 claims that will be due in the upcoming allotment period, and DAS must approve an allotment sufficient to pay such claims as long as the agency has appropriated funds available to pay the claims and to carry out the agency's mandatory duties for the remainder of the biennium, even if doing so will require the agency to discontinue or cut back on other statutory, but nonmandatory, activities. If, before the end of the biennium, the agency no longer has sufficient funds to perform all of its mandatory activities, the agency must determine which of its conflicting statutory mandates are primary. In no event, however, may the agency incur obligations in excess of its allotment or appropriation; at that point, the agency would no longer be required to perform its mandatory statutory duties. If the obligation to pay a Measure 7 claim would result in a debt limit violation, not only may the agency no longer enforce the regulation giving rise to the claim, but the statute requiring such regulation would no longer apply; at that point, the statute would cease to have legal force or effect.

(b) In deciding to forego enforcement, where the state agency's rules and statutes give it the discretion to do so, the agency must employ sufficiently consistent standards so as to operate under a coherent, systematic policy and those standards themselves must be constitutional.

## **SEVENTH QUESTION PRESENTED**

Measure 7 provides that the "adoption or enforcement of historically and commonly recognized nuisance laws shall not be deemed to have caused a reduction in the fair market value of a property," and that "the phrase historically and commonly recognized nuisance laws shall be narrowly construed in favor of a finding that just compensation is required."

(a) What are "historically and commonly recognized nuisance laws" within the meaning of this exception?

(b) Do these laws include newly adopted laws?

(c) What does it mean that the phrase historically and commonly recognized nuisance laws "shall be narrowly construed?"

## **ANSWER GIVEN**

(a) While the answer is not free from doubt, we believe that the voters intended the phrase "historically and commonly recognized nuisance laws" to mean statutes, rules and local

ordinances that restrict or prohibit uses of private real property that have historically and commonly been recognized as a nuisance by the judicial, legislative or quasi-legislative branches of government. This almost certainly includes particular state and local civil and criminal nuisance abatement laws. Less certain, but we believe still within the exception, are other long-standing restrictions and prohibitions of uses that operate to prevent or remedy harm or injury to public rights, health, safety or morals. It is unlikely that “nuisance laws” include laws enacted for the “general welfare” or to confer benefits on particular segments of society, rather than to prevent harm or injury. Determining whether a particular law is a “historically and commonly recognized law[ ]” will require a case-by-case analysis of the function of the particular law and the extent to which government has recognized the type of use regulated by the law as a nuisance.

The prohibition of certain uses of property as a common law nuisance is not within this exception because there is no property right to maintain a nuisance and therefore the prohibition does not constitute a regulation restricting a use that is part of the owner's property right to begin with.

(b) If a newly adopted law restricts uses of property that have historically and commonly been treated as a nuisance by government, the law is covered by the exception.

(c) We believe that the voters intended the directive that “historically and commonly recognized nuisance laws \* \* \* be narrowly construed in favor of a finding that just compensation is required” to require that there be a substantial body of prior law reaching back a substantial period that treats the type of use in question as a nuisance.

### **EIGHTH QUESTION PRESENTED**

Subsection (c) of Measure 7 provides that a regulating entity “may impose, to the minimum extent required, a regulation to implement a requirement of federal law without payment of compensation.”

(a) When does a regulation “implement a requirement of federal law”?

(b) What is meant by “may impose, to the minimum extent required”?

### **ANSWER GIVEN**

(a) A regulation implements a requirement of federal law when it gives practical effect to something that federal law calls for or demands.

(b) The clause “to the minimum extent required” limits the extent to which a state or local government regulation may restrict the use of private real property in order to implement a requirement of federal law without being subject to Measure 7’s compensation requirement. We believe the voters intended the exception in subsection (c) of the Measure to apply only if the state or local government is required to impose the regulation by federal, state or local law, court order or contract. Additionally, the scope of the regulation, in terms of its restriction on the use

of property, must be no broader than either the requirement of the federal law being implemented or the minimum that the state or local government is required to impose.

### **NINTH QUESTION PRESENTED**

What is the impact of Measure 7 on:

- (a) exclusive farm use zoning, ORS 215.203 to 215.327?
- (b) the Beach Bill, ORS 390.605 to 390.770?
- (c) the Bottle Bill, ORS 459A.700 to 459A.740 and 459.992(3) and (4)?

### **ANSWER GIVEN**

(a) Most forms of exclusive farm use zoning are a restriction on the use of private real property that will require compensation under Measure 7. The exception for nuisance laws will not apply to exclusive farm use zoning, and the exception for regulations that implement federal law is likely to have at most very limited application in this setting. Determining whether particular exclusive farm use regulations were adopted, first enforced or applied before a particular owner of real property became the owner will be complex due to the large number of amendments to these laws but, in general, owners who acquired their property before 1975 will have a right to compensation.

(b) Generally, area of the beach along Oregon's coast that is seaward of the ordinary high tide line is owned by the state. Although the area of the beach that is landward of the ordinary high tide line may be privately owned, the public has the right, under the doctrine of custom, to use the beach seaward of the "actual vegetation line" for recreational purposes. Any private uses that conflict with the public's right to use the beach<sup>iii/</sup> for recreational purposes have never been part of the upland property owner's property rights. Hence, to the extent the Beach Bill, ORS 390.605 to 390.770, and implementing regulations, restrict uses of the beach by an upland property owner that are inconsistent with the public's right to use the beach for recreational purposes, the regulations do not "restrict the use of private real property," and Measure 7 does not apply.

Measure 7 may apply to the Beach Bill regulations to the extent they regulate (1) an owner's use of a privately owned area of the beach in a manner not necessary to protect the public's right to recreational use, or (2) the use of private property landward of the actual vegetation line. In general, only owners who acquired their property before 1967 could have a right to compensation under Measure 7.

(c) To the extent the Bottle Bill requires dealers and distributors of carbonated beverages to set aside part of their private real property to make space for returnable empty containers, the Bottle Bill restricts the use of private real property, and Measure 7 applies. Only dealers and distributors who acquired their property before 1972 could have a right to compensation under Measure 7.



## TENTH QUESTION PRESENTED

Is the state required to provide funds to local governments for compensation that those governments must pay property owners under Measure 7? What if the Measure 7 compensation is due to a restriction on the use of private real property that state law requires local governments to impose?

## ANSWER GIVEN

The only legal obligation that the state may have to provide funds to local governments for compensation they must pay to property owners under Measure 7 arises under Article XI, section 15, of the Oregon Constitution, which restricts unfunded state mandates. Although Measure 7 is not itself a state-mandated program for which the state must provide funds to local government under Article XI, section 15, it is possible that costs incurred by local governments in compensating property owners under Measure 7 due to a post-1996 state-mandated “program,” as that term is defined in Article XI, section 15, may require the state to appropriate and allocate money to a local government.

## DISCUSSION

Many of the above questions require us to interpret the provisions of Measure 7, which were added to Article I, section 18, of the Oregon Constitution. Before turning to those questions, we briefly describe our method of analysis, the objective of which “is to discern the intent of the voters” in adopting these provisions. See *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993).

In interpreting a constitutional provision adopted through the initiative process, the Oregon Supreme Court applies the same method of analysis that it applies to initiated constitutional amendments. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 61, 11 P3d 228 (2000). Thus, the court applies the same method of analysis that it applies to the construction of a statute. See *Roseburg*, 316 Or at 378; *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560 n 8, 871 P2d 106 (1994); *PGE v. Bureau of Labor and Industries (PGE)*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993).

We follow the same methodology. We first look at the text and context of the provision to determine the intent of the voters, with the text being the best evidence of their intent. *PGE*, 317 Or at 610. In interpreting the text, we consider statutory and judicially developed rules of construction “that bear directly on how to read the text,” such as “not to insert what has been omitted, or to omit what has been inserted,” and to give words of common usage their plain, natural and ordinary meaning. *Id.* at 611; ORS 174.010. An analysis of the text provision includes relevant case law interpreting that text. *Stranahan*, 331 Or at 61. The context of a constitutional provision adopted by ballot measure includes related ballot measures before the voters at the same election and related constitutional provisions that were in place when the provision at issue was adopted, and case law interpreting such provisions. *Id.* at 62 n 15; *Ecumenical Ministries*, 318 Or at 560 n 8; *SAIF Corporation v. Walker*, 330 Or 102, 108, 996 P2d 979 (2000). If the voters’ intent is clear from the text and context, the search ends there.

The Oregon Supreme Court, however, is unlikely to conclude analysis of an initiated measure at the first level of review. *Stranahan*, 331 Or at 64.

The second level of review is an examination of the history of the provision. The history of an initiated constitutional provision includes information available to the voters at the time the measure was adopted that discloses the public's understanding of the measure. *Ecumenical Ministries*, 318 Or at 560 n 8. Sources of such information include the ballot title,<sup>iv</sup> explanatory statement<sup>v</sup> and arguments for and against the measure included in the Voters' Pamphlet as well as contemporaneous news reports and editorials on the measure. *Id.* The extent to which these sources of information will be considered depends on their objectivity, as well as their disclosure of public understanding. *Stranahan*, 331 Or at 65 (citing *LaGrande/Astoria v. PERB*, 284 Or 173, 184 n 8, 586 P2d 765 (1978)).

If, after considering text, context and history of the measure, the intent of the voters remains unclear, we may resort to judicial rules of construction to resolve any remaining uncertainty. *PGE*, 317 Or at 612.

The method of analysis described above also applies to the interpretation of statutes, except that we are attempting to ascertain the intent of the legislature. *PGE*, at 612 n 4; *Roseburg*, 316 Or at 378 n 4, 379 n 5. We first examine the statute's text and context, including textual principles of statutory construction, as well as other provisions of the same statute and other statutes on the same subject. Only if the legislative intent remains unclear after an examination of text and context would we consider legislative history.

With these principles in mind, we now turn to the questions we have been asked.

## I. Procedures for Measure 7 Claims

Before the enactment of Measure 7, the circuit courts had jurisdiction over inverse condemnation claims arising under Article I, section 18, where property owners were seeking compensation rather than invalidation of the regulation. See *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 196, 935 P2d 411 (1997), *appeal after remand* 164 Or App 144, 991 P2d 563 (1999), *rev den* 331 Or 244, \_\_ P2d \_\_ (2000), *pet for cert filed* \_\_\_\_USLW\_\_\_\_(US Jan. 30, 2001) (No.00-1238). Under Measure 7, we believe that property owners must first apply to the executive branch of the state for compensation on claims against the state.

By its terms, Measure 7 anticipates executive branch determination of claims. The provision in subsection (d) of Measure 7 that a claimant "applies" for compensation indicates an administrative rather than judicial process. Subsection (e) refers to a "claim for compensation [that] is denied or not fully paid within 90 days of filing," which also reflects that the claim determination will be made by an administrative agency. Thus, we conclude that the claim procedures for Measure 7 are administrative rather than judicial.

Within this framework, we consider whether any state agencies have authority to adopt rules governing the processing of Measure 7 claims under current law, or whether legislation is required.

## **A. Authority to Adopt Rules Governing the Processing of Claims**

Measure 7 does not address the procedures for processing claims for compensation by property owners. Subsection (d), the most salient provision of the Measure in regard to process, states:

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 Measure does not indicate the process by which the property owner is to “apply for compensation.” Neither does the Measure name the state agency or agencies responsible for receiving, processing and adjudicating claims for compensation. Given the lack of guidance in the Constitution, we turn to existing statutes to determine the scope of authority provided to agencies to establish rules for the processing of Measure 7 claims.

ORS chapter 293 sets out a generic process for approving and paying claims against the state. ORS 293.295 to 293.515. Specifically, ORS 293.306 authorizes DAS to

prescribe forms and procedures consistent with law for claims subject to disapproval by the department under ORS 293.300 and for the presentment, processing, approval and disapproval by state agencies and the department and drawing of warrants, checks or orders in payment of those claims. The use of forms and compliance with procedures so prescribed is required.

DAS’s authority under this statute is limited to prescribing forms and procedures for those claims that are subject to disapproval by DAS under ORS 293.300. ORS 293.300 provides that, except for claims based on obligations incurred or expenditures made by the Legislative Assembly, the courts, or the Secretary of State or State Treasurer in performance of their constitutional functions, “a claim for payment from any moneys in the State Treasury” may not be paid if the claim is disapproved by DAS.<sup>vi/</sup> Although Measure 7 does not specify the source for payment of Measure 7 claims, we have little doubt that Measure 7 claims against the state will be paid from moneys in the State Treasury,<sup>vii/</sup> and that Measure 7 claims are therefore subject to disapproval by DAS under ORS 293.300 unless the claim is based upon obligations incurred by the legislature, the courts, the Secretary of State or the Treasurer.

As a practical matter, it appears that DAS has historically exercised its authority under ORS 293.306 only with regard to claims for payment related to the provision of goods and services to the state, i.e., vendor claims. Before 1967, when the authority currently held by DAS resided with the Secretary of State, the legislature had limited the disapproval authority to vendor claims. ORS 293.305(3) (1965).<sup>viii/</sup> That statutory limitation was repealed in 1967. Or Laws 1967, ch 454, § 119. We have found no basis to read that historical limitation into the current version of ORS 293.300. To do so would conflict with established rules of statutory interpretation. *See* ORS 174.010 (impermissible to insert into a statute what the legislature has

omitted). Thus, we conclude that ORS 293.306 gives DAS the authority to establish forms and procedures for the “presentment, processing, approval and disapproval” of claims under Measure 7, except for claims based upon obligations incurred by the legislature, the courts, the Secretary of State or the State Treasurer.

We have identified no other statute authorizing DAS or any other state agency to prescribe forms or procedures for processing Measure 7 claims. ORS chapter 35 and chapter 281 contain procedures by which the state pays compensation in relation to the exercise of its authority of eminent domain, i.e., the power to take property within its jurisdiction for a public use or benefit. The procedures contained in these statutes do not apply to Measure 7 claims, however, because Measure 7 claims arise from the exercise of regulatory authority separate and distinct from that of eminent domain. *See* discussion in Part V B of this opinion, below.

If DAS exercises its authority under ORS 293.306 to prescribe forms and procedures for Measure 7 claims, the use of such forms and compliance with those procedures will be mandatory. ORS 293.306(1).

## **B. Scope of DAS Authority**

Having concluded that ORS 293.306 authorize DAS to prescribe procedures for Measure 7 claims, we now consider the extent to which DAS may adopt rules addressing: (1) the proper form and content of a claim, (2) the time limitations within which a claim must be filed, (3) where a claim must be submitted, (4) the adjudication of claims and (5) the substantive interpretation of Measure 7.

### **1. Proper Form and Content of a Claim**

ORS 293.295 to 293.515 establishes a generic framework for approving and paying claims against the state that applies to a wide spectrum of claims. DAS’s authority under ORS 293.306 to prescribe forms and procedures for that process, likewise, is generic. In other words, DAS’s authority to prescribe the content of a claim is limited by the general nature of the statutory scheme to which ORS 293.306 belongs.

The following pieces of information are common to any claim for payment of money from the State Treasury: (a) the name and address of the claimant, (b) a statement of the nature and amount of the claim, (c) a statement of the legal and factual bases for the claim and (d) evidence in support thereof. ORS 293.321(1) refers to a claimant presenting “evidence in support” of a claim for payment. We conclude from this reference that DAS may not only require a claimant to state the legal and factual bases for a claim but may also require a claimant to provide evidence to support his or her assertions.

Although necessary elements may vary depending upon the type of claim, for any particular type of claim there will be certain elements that are necessary in order for the state to be able to approve or disapprove the claim. DAS may require a claim to contain such information; without it a claim would not be complete. For example, DAS could reasonably require a vendor claim for payment for goods delivered to a state agency under a contract to

include the name and address of the vendor, a statement identifying the goods delivered, the date of delivery and the amount of money due, and a reference to the contract provision allowing payment. In the context of Measure 7, DAS could reasonably require a claim to include the name(s) and address(es) of the owner(s) of the property, a statement that the claim is being made under Article I, section 18, as amended by Measure 7, and the amount of money being claimed, a legal description of the property, a statement of when the claimant(s) became owner(s) of that property and evidence of that ownership, a citation to the regulation that is claimed to restrict the use of that property, a statement explaining how the regulation is claimed to restrict the use of the property and reduce its value, and evidence that supports the claimed reduction in the property's value.

We do not find the language of ORS 293.306 and 293.321 sufficient, however, to authorize DAS to mandate the type of evidence that the claimant must provide. For example, we do not believe that DAS has the authority to require that a claimant submit a property appraisal to support the reduction in property value claimed. Instead, DAS may only require that the claimant provide evidence to support each of the elements of his or her claim, e.g., evidence of ownership and evidence that such restriction reduces the value of the claimant's property in the amount claimed.

While we conclude that DAS's authority to prescribe the content of a claim is limited, it is nonetheless meaningful. ORS 293.306(1) states that the use of forms and compliance with procedures prescribed by DAS is required. Consequently, if a claimant failed to complete the forms or to follow the procedures prescribed by DAS, the claimant would not have properly filed a complete claim. In the context of Measure 7, failure to file a complete claim would mean that the 90-day period after which compensation is "due" under subsection (d) of Measure 7 does not begin to run. Although a claim could not be rejected as incomplete on the basis of the quality of evidence submitted, it could be rejected as incomplete if the claimant failed to submit any evidence in support of one or more elements of the claim.

## **2. Time Limit for Filing a Claim**

ORS 293.321 establishes the time limitation within which a claimant must file a claim against the state for payment from moneys in the State Treasury. This time limitation is generally two years after the date on which the claim accrued.<sup>ix/</sup> ORS 293.321. Although ORS 12.080(3) provides a six-year statute of limitations for an action for interference with any interest of another in real property, the time periods established in ORS chapter 12, including the six-year period stated in ORS 12.080(3), apply "except where a differing limitation is prescribed by statute." ORS 12.010. Because a statute outside of ORS chapter 12, specifically ORS 293.321, specifies a two-year time limitation, we conclude that ORS 12.080(3) does not apply to the filing of Measure 7 claims.<sup>x/</sup>

Because all compensation for Measure 7 claims against the state will be paid from moneys in the State Treasury, the two-year time limit in ORS 293.321 applies to such claims. Any rule promulgated by DAS would need to be consistent with this time limit.

### **3. Where Claims Are Submitted**

The statute that sets the time limitations for filing a claim against the state for payment from moneys in the State Treasury, ORS 293.321, provides that a claimant “shall present the claim, with the evidence in support thereof, to [DAS] or the state agency that incurred the obligation or made the expenditure on which the claim is based.” Because ORS 293.306 gives DAS the authority to prescribe procedures for the presentment and processing of claims, we conclude that DAS may specify whether Measure 7 claims must be presented to DAS or to the state agency that incurred the obligation, i.e., the agency that adopted or is enforcing the regulation responsible for allegedly reducing the value of the claimant’s property. In light of the language in ORS 293.321, DAS may not identify any other agency to receive claims.

### **4. Claim Adjudication**

ORS 293.300 requires that DAS disapprove a claim if, among other criteria, the claim does not “satisfy requirements as provided by law.” Such requirements would include not only the provisions of Measure 7, but also any other laws applicable to such claims. Under ORS 293.295, a claim for payment of moneys from the State Treasury may not be paid unless the claim “is supported by the approval of the state agency that incurred the obligation or made the expenditure on which the claim is based.” If this statutory requirement is not met, DAS would be required to disapprove the claim. Reading ORS 293.295 and 293.300 together suggests that the state agency that incurred the obligation, i.e., the agency that adopts or enforces the regulation that is the subject of a Measure 7 claim, must make the initial determination of whether a claim should be paid and that DAS must also be satisfied that the claim may lawfully be paid.

ORS 293.306 authorizes DAS to prescribe procedures for the processing, approval and disapproval of claims by state agencies and the department. ORS 293.311 further authorizes DAS to require “any person” to answer under oath as to facts relating to a submitted claim, thus giving DAS the authority to obtain evidence beyond that submitted by the claimant so that a correct determination may be made on the claim. We believe that, pursuant to these statutes, DAS has the authority to adopt rules that establish an adjudicatory process for Measure 7 claims. As noted above, compliance with the procedures prescribed by DAS are required. ORS 293.306(1).

Any person aggrieved by the disallowance of a claim against a state agency may appeal the disallowance under ORS 183.482, which provides for filing a petition for judicial review in the Court of Appeals. ORS 293.316. Because judicial review under ORS 183.482 is confined to the record developed by the agency, ORS 183.482(7), the adjudicatory process established by DAS must be sufficient to permit a determination that the claim should be approved or disapproved, while satisfying the claimant’s right to due process. Even though judicial review under ORS 183.482 is the type of review provided for contested cases, we do not intend to suggest here that a Measure 7 claimant is entitled to a contested case hearing as part of the DAS procedures.<sup>xi/</sup> DAS’s process need only be sufficient to provide a record that is adequate for review by the court and to satisfy the constitutional requirements for a meaningful hearing under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See*

*Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893, 47 L Ed2d 18 (1976). The question of the type of hearing that is due Measure 7 claimants is beyond the scope of this opinion, although we note that, at a minimum, it must permit a claimant an opportunity to submit written evidence, to review the evidence upon which the agency intends to rely and to explain in writing why the claimant disagrees with that evidence.

ORS chapter 293 does not address all of the issues that will be relevant to Measure 7 claims. For example, the authority that DAS has under ORS 293.306 to prescribe the process for adjudicating Measure 7 claims does not appear to extend to matters of a more substantive nature, such as allocating the burden of proof, requiring particular types of evidence to be presented or requiring that all claims to the state for a particular piece of real property be filed together or separately.

## **5. Substantive Interpretation of Measure 7**

We are also asked whether a state agency may adopt rules interpreting the substantive provisions of Measure 7 in order to aid in its implementation. Because neither the voters in Measure 7 nor the legislature in any statutes have delegated authority to a state agency to implement Measure 7, we conclude that no state agency has authority at this time to adopt interpretive or implementing rules concerning the substantive provisions of the Measure. *See* 45 Op Atty Gen 59, 62-64 (1986) (Department of Revenue’s general rulemaking authority not sufficient to permit it to effectuate aspects of sales tax measure).

## **II. “Regulation”**

Under Measure 7, compensation is due to a property owner only if a “regulation \* \* \* restricts the use of private real property.” This set of questions concerns the term “regulation” as used in Measure 7. Specifically, we are asked what is included within that term, when a regulation “restricts the use of private real property,” and whether the exception for a regulation that prohibits certain activities includes a regulation that merely restricts those same activities.

### **A. Meaning of “Regulation”**

The term “regulation” is defined in subsection (e) of Measure 7 as follows:

“[R]egulation” shall include any law, rule, ordinance, resolution, goal, or other enforceable enactment of government[.]

This definition describes what are generally understood to be legislative or quasi-legislative acts by governmental bodies.

The terms “law,” “rule” and “ordinance” need no explanation. “Resolution” is a familiar term that frequently refers to provisions passed by the legislature or other governing body. *See, e.g.*, ORS 171.405 (referring to publication of “joint resolutions passed at each session of the Legislative Assembly”), ORS 221.310 (providing that in some cities, “no \* \* \* resolution shall take effect until 30 days after its passage by the council and approval by the mayor”), ORS

223.393 (assessments become a lien upon property “from and after the passage of the ordinance or resolution spreading the same and entry in appropriate lien record of the governmental unit”). Similarly, “goal” is a familiar term in Oregon law related to land use regulation and, in this case, almost certainly includes “goal” as defined in ORS 197.015(8), i.e., “the mandatory statewide planning standards adopted by [LCDC] pursuant to ORS chapters 195, 196 and 197.”

Measure 7 includes within the definition of “regulation” those items that are specifically enumerated, but the list is not exclusive; the definition ends with the clause “other enforceable enactment.” The relevant common meaning of “enactment” is “PASSING (the [enactment] of a bill by the legislature to aid private industry) **2** : something that has been enacted (as a law, bill, or statute).” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993) (hereinafter WEBSTER'S) at 745. To “enact” means “to make into a law, to perform the last act of legislation upon (a bill) that gives the validity of law.” *Id.* The legal meaning of “enactment” is similar, referring to “the action or process of making into law <enactment of a legislative bill>” or more simply, a “statute <a recent enactment>.” BLACK'S LAW DICTIONARY (7th ed 1999) (hereinafter BLACK'S) at 546.

Thus, we conclude that the term “regulation” in Measure 7 includes all, but only, legislative or quasi-legislative acts of governmental bodies. Contracts, torts, administrative orders, adjudicatory decisions or other actions of government that are not law-making do not fit the definition of “regulation.”<sup>xiii/</sup>

We further conclude that a legislative or quasi-legislative act must be enforceable to be a “regulation” for purposes of Measure 7. Although two of the terms in the definition, “resolution” and “goal,” are ambiguous in this regard because their common meanings include mere expressions of intention or purpose, nothing in the text, context or history of the Measure supports such an interpretation of those terms. The textual maxim of statutory construction *noscitur a sociis* provides that the meaning of an unclear word should be determined by the words immediately surrounding it. *State v. Moen*, 309 Or 45, 89 n 17, 786 P2d 111 (1990) (quoting *California v. Brown*, 479 US 538, 542-43, 107 S Ct 837, 840, 93 L Ed2d 934 (1987) (“doctrine of *noscitur a sociis* [‘he is known by his companions’] is based on common sense”). The words “law, rule, ordinance,” which immediately precede “resolution” and “goal” are enforceable acts. And the immediately following words – “other enforceable enactments” – expressly require an enactment to be enforceable.

The context of Measure 7 also leads to the conclusion that a resolution or goal must be enforceable to come within the meaning of “regulation.” As discussed below, subsection (a) of Measure 7 predicates a property owner’s right to compensation on a regulation that “restricts” the use of property. The use of property cannot be restricted by a governmental act that is not capable of being enforced because it is a mere statement of intent or purpose. Likewise, the exceptions for “historically and commonly recognized nuisance laws,” in subsection (b), and for regulations implementing a “requirement of federal law” and “prohibiting” certain uses of property, in subsection (c), also describe enforceable acts. Finally, the inclusion in the definition of “reduction in the fair market value” of the net costs of certain “affirmative obligation[s]” is consistent with the interpretation that a legislative or quasi-legislative act must be enforceable to be a “regulation” for purposes of Measure 7.



In sum, we conclude that for purposes of Measure 7, a “regulation” is any law, rule, ordinance or other enforceable legislative or quasi-legislative action of government. We further conclude that a “resolution” or “goal” is a regulation only if it is enforceable.

## **B. A Regulation that “Restricts the Use of Private Real Property”**

Under Measure 7, one of the predicates to a property owner’s right to compensation is that government passes or enforces a regulation that “restricts the use of private real property.”

### **1. Background Principles of Private Property Rights**

In order to understand the meaning of a “regulation that restricts the use of private real property,” it is first necessary to understand what property rights are inherent in the title held by an owner of private real property. The starting point for this analysis is *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed2d 798 (1992). In *Lucas*, the United States Supreme Court considered whether South Carolina’s Beachfront Management Act was a “taking” of property that required the state to pay compensation under the Fifth Amendment of the United States Constitution. The Court concluded that there must be a threshold determination whether, under the “background principles” of property law, the proscribed uses were part of the property owner’s title to begin with. 505 US at 1027.

Although *Lucas* was decided under the Fifth Amendment to the United States Constitution, the same analysis into the nature of the property owner’s title is used by the Oregon courts as a threshold determination for any taking claim under Article I, section 18, of the Oregon Constitution. *Kinross Copper Corp. v. State*, 160 Or App 513, 518, 981 P2d 833 (1999), *rev den* 330 Or 71, 994 P2d 133, *cert denied* \_\_ US \_\_, 121 S Ct 387 (2000). Measure 7 does not alter the fact that there can be no constitutional taking if the right taken is not part of the owner’s title. Measure 7 does not change the nature of the rights that inhere in an owner’s title, but merely requires compensation for regulations that restrict a use in a manner that reduces the value of the owner’s property. A Measure 7 claim cannot be based on an alleged restriction of use, however, where the claim arises out of a prohibition or restriction of a use that the title to the property never conferred on the owner.

Courts have recognized a number of exclusions from the rights included in an owner’s title to private real property. While it is impossible to identify every “right” that does not inhere in a private property owner’s title under Oregon law, and therefore could not support a Measure 7 claim for compensation, we discuss some of the major examples below. These exclusions from the rights inherent in the title to property can be roughly grouped into two categories: public rights and nuisance.

#### **a. Public Rights**

The first broad category of exclusions from the rights that inhere in the title to private property may loosely be called “public rights.” Within the category of public rights, there are a number of specific exclusions.

The most well known public rights exclusion from the title obtained by a private property owner in Oregon is based on the customary use by the public of the dry sand area of oceanfront property. As a result of this inherent public right, there is no private property right to exclude the public from these privately owned dry sand beach areas. *State ex rel Thornton v. Hay*, 254 Or 584, 588, 462 P2d 671 (1969) (dry sand area of beaches is subject to customary use of the public for “picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede”). (The nature of public and private rights to Oregon’s beaches is more fully discussed in Part IX B of this opinion.)

Another public right inherent in the title to private property is the federal navigational servitude. See *Lucas*, 505 US 1028-29 (citing *Scranton v. Wheeler*, 179 US 141, 163, 21 S Ct 48, 45 L Ed2d 126 (1900) (federal navigational servitude limits property rights of owner of submerged lands bordering a public navigable water)); see also *United States v. Cherokee Nation*, 480 US 700, 704-05, 107 S Ct 1487, 94 L Ed2d 704 (1987) (private owner’s title is acquired and held subject to navigational servitude). For example, the United States Court of Appeals for the Third Circuit has held that there can be no takings challenge to a prohibition on the use of a coal loading facility located on a navigable river because “the navigational servitude [is] a pre-existing limitation in riparian landowners’ estate.” *United States v. 30.54 Acres of Land*, 90 F3d 790, 795 (3<sup>rd</sup> Cir 1996).

Similarly, the state holds in trust for the public certain rights in submerged and submersible lands. These rights, which are inherent exclusions from the title of any riparian property owner, flow from events occurring upon Oregon’s admission to the Union on February 14, 1859. At that time, Oregon became the owner of the submerged and submersible lands under all tidal waters and navigable rivers and lakes. See *Pollard’s Lessee v. Hagan*, 44 US 212, 220 3 How 212, 11 L Ed 565 (1845) (because original 13 states took ownership of submerged and submersible lands when the Union was established, remaining states also took such title upon their admission to the Union); see *United States v. Oregon*, 295 US 1, 14, 55 S Ct 610, 79 L Ed 1267 (1935) (Oregon owns all submerged and submersible lands). See also *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 US 363, 97 S Ct 582, 50 L Ed2d 550 (1977).

Another type of public right includes state ownership (more accurately, ownership by the public but held in trust by the state) of fish and wildlife. See *Columbia River Fisherman’s Protective Union v. City of St. Helens*, 160 Or 654, 661, 87 P2d 195 (1939) (State of Oregon owned fish in Columbia River, as far as ownership could be established before fish were caught). See *State v. Hume*, 52 Or 1, 95 P 808 (1908) (state owns migratory fish and game within its borders in trust for all its citizens).

A final example of a public right limiting private title to real property has to do with public ownership of water. Public ownership of water is the result, in Oregon and other Western states, of federal statutes providing for the disposal of federal public domain land in the mid- to late-19<sup>th</sup> century. These statutes were premised on the fact that the federal government owned the public domain land, as well as the water thereon, before a state’s admission to the Union. As part of this ownership, the federal government could, and did, dispose of the land and the water separately. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 US 142, 55 S Ct

725, 79 L Ed 1356 (1935). Under the Homestead Act of 1866, the federal government provided that local customs and laws governed usage of water in the west. *Id.* 295 US at 154-55. And, under the Desert Land Act of 1877, the federal government made explicit that water “shall remain and be held free for the appropriation and use of the public.” 43 USC § 321. The Supreme Court interpreted the Desert Land Act to mean that western states exercise plenary control over previously unappropriated water and may dispose of it under state law. Well before the Supreme Court's 1935 interpretation of the Desert Land Act, Oregon recognized that surface waters were owned by the state (more accurately the public, held in trust by the state) when, in 1909, the legislature enacted a comprehensive water code providing, in part, “all water within the state from all sources of water supply belongs to the public.” ORS 537.110. Thus, no private title to real property includes any water naturally occurring in any body of water on the property. *See California Oregon Power Co.*, 295 US 142 (navigable waters); *Shivley v. Bowlby*, 152 US 1, 49-50, 14 S Ct 548, 38 L Ed 331 (1894) (navigable waters held by United States “in trust for the future States”; title “vests in the several States, when organized and admitted to the Union”); *Jones v. Warm Springs Irr. Dist.*, 162 Or 186, 196, 91 P2d 542 (1939) (water in naturally occurring watercourse is “nobody's property” and “belongs to the public”).

## b. Nuisance

The second broad category of exclusions from the rights inherent in a private property owner's title is based on common law nuisance. An elemental principle of Oregon's property law is that private landowners do not have a right to produce or maintain a public nuisance on their property. *See, e.g., Smojkal v. Empire Lite-Rock, Inc.*, 274 Or 571, 547 P2d 1363 (1976). The Oregon courts have long recognized that a number of different activities constitute nuisances and that the right to engage in these activities is not part of the property owner's title. Examples of nuisance include: air emissions from rock quarrying and crushing operations, *Bither v. Baker Rock Crushing Co.*, 249 Or 640, 438 P2d 988 (1968); operation of meat packaging company, *State ex rel. State Sanitary Authority v. Pacific Meat Co.*, 226 Or 494, 360 P2d 634 (1961); operation of a rendering plant, *Keller v. Gibson Packaging Co.*, 198 Or 510, 257 P2d 621 (1953); pollution of rivers resulting in fish kills, *Columbia River Fishermen's Protective Union v. City of St. Helens*, 160 Or 654, 87 P2d 195 (1939); polluted waters overflowing onto plaintiff's land because of defendant's sewage discharge, *Miller v. City of Woodburn*, 126 Or 621, 270 P 781 (1928); public nudity, *Mark v. State Department of Fish and Wildlife*, 158 Or App 355, 974 P2d 716, *rev den* 329 Or 479 (1999); and low frequency sound waves resulting from power generating activities, *Fraday v. Portland General Electric*, 55 Or App 344, 637 P2d 1345 (1981). (Common law nuisance and the exception in subsection (b) of Measure 7 for “historically and commonly recognized nuisance laws” are discussed more fully in Part VII of this opinion.)

It is against the backdrop of these public rights and nuisance, which are inherent exclusions from a property owner's title, that Measure 7's reference to a “regulation that restricts the use of private real property” must be interpreted. A regulation can only restrict the use of private real property if the restricted use is part of the owner's private property right. In other words, if the private property owner's title does not include the right to use the property in a particular way, a regulation cannot be said to restrict that use of that private real property for purposes of Measure 7.

## 2. Restrictions on “Use” of Private Real Property

Subsection (a) of Measure 7 predicates compensation on “a regulation that restricts the use of private real property.” We turn now to the meaning of this clause.

A regulation will not come within subsection (a) merely because it affects the use of real property. Similarly, if a regulation is directed at conduct generally, rather than at the “use of private real property” specifically, we do not believe the regulation requires compensation under Measure 7. And regulations that restrict or even prohibit the use of personal property, such as those relating to firearms in ORS chapter 166, are not affected by the Measure. Finally, as discussed above, we conclude that a regulation does not restrict the use of private real property if the use to which the restriction is directed is not a property right that the owner’s title included to begin with.

We begin with the ordinary meaning of the words “restrict,” “use,” and “property.” The term “restrict” is defined as:

**1** : to set bounds or limits to : hold within bounds: as **a** : to check free activity, motion, progress, or departure of : RESTRAIN \* \* \* **b** : to check, bound, or decrease the range, scope, or incidence of : set what is to be included or embraced by : bar or carefully govern addition or increment to \* \* \* **2** to place (land) under restrictions as to use (as by zoning ordinances) **syn** see LIMIT.

WEBSTER’S at 1937. The relevant definitions of the noun “use” are:

**3 a** : the privilege or benefit of using something \* \* \* <had the [use] of the usual class time for study> <nor shall private property be taken for public [use] without just compensation - *U.S. Constitution*> \* \* \* **c** : the legal enjoyment of property that consists in its employment, occupation, exercise, or practice <[use] of the automobile is covered by insurance> \* \* \* **5 a** : the benefit in law of one or more persons; *specif* : the benefit of or the profit arising from lands and tenements to which legal title is held by a person in whom a trust or confidence is reposed that another person should take and enjoy \* \* \*.

*Id.* at 2523. Although the term “real property” is defined in subsection (e) of the Measure,<sup>xiii/</sup> we also consider the meaning of the term “property,” which is not defined in the Measure, because we believe it sheds light on what a restriction on “use” might mean. The ordinary meaning of “property” in the context of “real property” is:

**2 a** : something that is or may be owned or possessed : \* \* \* *specif* : a piece of real estate <the house . . . surrounded by the [property] \* \* \*> **b** : the exclusive right to possess, enjoy, and dispose of a thing : a valuable right or interest primarily a source or element of wealth \* \* \* **c** : something to which a person has a legal title : an estate in tangible assets (as land, goods, money) \* \* \* or to which a person has a right protected by law.

*Id.* at 1818. Based on these definitions, we believe that the ordinary meaning of the phrase “a regulation that restricts the use of private real property” includes regulations that, with respect to land or other real property: (1) limit or bar the exclusive right of the owner to possess or dispose of the property, (2) limit or bar the purposes for which property may be employed or occupied, (3) limit or govern the extent to which or the conditions under which property may be employed (whether generally or for a particular purpose), or (4) limit or bar the benefit or profit arising from the employment or occupation of the property.

A related provision of Measure 7 gives some insight into what the voters intended to include within the scope of regulations that “restrict[ ] the use of private real property.” Subsection (c) provides that regulations prohibiting the use of real property for certain purposes do not require compensation under Measure 7.<sup>xiv</sup> This exclusion suggests that prohibitions regarding how private real property is used are generally within the definition of a “regulation that restricts the use of \* \* \* property.” Although the legal meaning of the word “restricts” may not always include a prohibition, *cf. Hay v. Oregon Dept. of Transp.*, 301 Or 129, 719 P2d 860 (1986) (statute authorizing agency to “restrict” as opposed to “prohibit” a use means that agency may allow the use subject to spatial and temporal limits), the text of subsection (c) of Measure 7 makes it clear that in this case the voters intended the meaning of “restricts the use” to have its ordinary, broad definition. If the prohibitions listed in subsection (c) were not regulations that restrict the use of private property, there would have been no reason to exclude them from Measure 7’s compensation requirement, and this portion of subsection (c) would be meaningless. Based on the ordinary meaning of the word “restrict” and the explicit exclusion of certain regulatory prohibitions in subsection (c) of the Measure, we conclude that regulations that restrict the use of private real property include regulations that prohibit or bar the use of private real property for particular purposes.

In an admittedly different context, but construing language very close to that of Measure 7, the Oregon Supreme Court held that the ordinary meaning of the phrase “governmental restriction as to use,” as it is used in a real property taxation statute (ORS 308.205(2)), is “a governmental restriction as to the method or manner of using the property in question, or as to how the property is employed or occupied.” *Bayridge Assoc. Ltd. Partnership v. Dept. of Rev.*, 321 Or 21, 29, 892 P2d 1002 (1995); *see also Pollin v. Dept. of Rev.*, 326 Or 427, 952 P2d 537, *cert den*, 524 US 954, 118 S Ct 2371, 141 L Ed2d 739 (1998) (determining whether particular restrictions contained in lease between Port of Portland and private party were governmental restrictions for purposes of property tax statutes). The details of the court’s decisions in these property tax cases are not germane to the issue of what a *regulation* restricting the use of property is because the tax statutes encompass contractual restrictions as well as regulatory ones. Nevertheless, the general thrust of the court’s construction tends to lend support to a broad reading of the voters’ intent in the phrase “a regulation that restricts the use of private real property,” i.e., that this phrase includes regulations that restrict both the method or manner of using property as well as the purposes for which the property is used.

In addition to the text of Measure 7, we consider its context, which includes the previously enacted provisions of Article I, section 18 that were amended by the Measure and case law interpreting the text being amended. Before its amendment by Measure 7, Article I, section 18 gave the owners of real property the right to compensation when their property was

“taken for public use.” Thus, for example, an ordinance requiring property owners to convey an easement to a city was a taking for public use. *Ferguson v. City of Mill City*, 120 Or App 210, 852 P2d 205 (1993). In contrast, a regulatory restriction on an owner’s use where no public acquisition of the property was contemplated was not generally compensable under Article I, section 18, unless the regulation did not allow any substantial economically viable or beneficial use of the property. *Dodd v. Hood River County*, 317 Or 172, 181-82 n 12, 855 P2d 608 (1993) (denying compensation for zoning regulation limiting use of property to forest uses). Thus, before Measure 7, government was required to compensate property owners for regulatory restrictions on the use of real property, but only if those restrictions precluded all substantial beneficial use of the property by the private owner – effectively transferring title to the property to the public. Measure 7 expands the circumstances in which compensation is required to regulations that restrict the use of private real property to any degree and regardless of whether the government acquires the property (assuming that the restriction also reduces the value of the property and the other requirements of the Measure are met). Despite this change, we believe that a short discussion of the case law applying Article I, section 18, as it existed pre-Measure 7, to regulatory restrictions on private real property helps clarify the types of governmental regulations that do and that do not restrict the use of private real property for purposes of Measure 7.<sup>xv/</sup>

The Oregon courts routinely denied compensation under Article I, section 18, where the “regulation” in question was directed at protecting the public health, safety or welfare from harm or injury. *Thomas v. State Dept. of State Police*, 138 Or App 209, 211, 907 P2d 262 (1995) (statutory prohibition on manufacture of private video poker machines); *State ex rel. Schrunck v. Metz*, 125 Or App 405, 413, 867 P2d 503 (1993) (seizure of restaurant assets for violation of gambling laws); *Benson v. City of Portland*, 119 Or App 406, 412, 850 P2d 416, *rev den* 318 Or 204, 862 P2d 1304 (1993) (derelict building ordinance requiring ongoing maintenance and payment of a fee); *Shaffer v. City of Winston*, 33 Or App 391 (city ordinance requiring maintenance of buildings, and providing for demolition if abandoned or vacant); *Willard v. City of Eugene*, 25 Or App 491, 495, 550 P2d 457 (1976) (abatement of a dangerous building, even without notice, does not require compensation). They denied compensation either because, as discussed above in Part II B 1 of this opinion, the use involved the creation or maintenance of a nuisance, or more generally because the government was using its regulatory powers as opposed to its powers to acquire property through eminent domain. See *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 613, 581 P2d 50 (1978).

The courts also routinely denied compensation where the regulation was an exercise of government taxing power. *Hughes v. State*, 314 Or 1, 838 P2d 1018 (1992) (no compensation for regulation involving the state’s taxing power under Article I, section 18). See generally NICHOLS ON EMINENT DOMAIN, § 1.4 (comparing eminent domain power to acquire property with other governmental powers).

For three reasons, we believe that Measure 7 effectively eliminates the prior rule that government’s exercise of its regulatory powers does not require compensation. First, the text of subsection (a) of Measure 7 expressly requires compensation for regulations that “restrict[ ] the use of private real property.” In contrast to the previous language of Article I, section 18, which was limited to private property that is “taken for public use,” Measure 7 is not limited to a

“taking” of property, but instead explicitly includes restrictions on use. To the extent a government regulation “restricts the use of private real property,” there is no longer any basis in the text of Article I, section 18, as amended by Measure 7, to exclude that regulation from its purview solely because the regulation is an exercise of government’s regulatory powers to prevent harm to the public health, safety or welfare.

Second, the exception for historically and commonly recognized nuisance laws in subsection (b) of Measure 7 demonstrates that the voters considered at least some nuisance laws to “restrict[ ] the use of private real property” as that phrase is used in subsection (a). The prototypical nuisance laws are those that prevent harm or injury to the public. *See, e.g.*, ORS 105.505 to 105.600. There would be no reason to exclude such laws in subsection (b) of Measure 7 if they were not also restrictions on the use of property under subsection (a) of the Measure.

Third, the nature of the regulations excepted in subsection (c) of Measure 7 demonstrates that regulations to protect public health, safety and welfare are covered by subsection (a). Subsection (c) excepts from Measure 7’s compensation requirement a government regulation prohibiting the use of property for the sale of pornography, performing nude dancing, selling alcohol or other controlled substances, or operating a casino or gaming parlor. These are prototypical regulations to protect public health, safety and welfare. By providing an explicit exception for this limited set of regulations, it is apparent that the voters intended other regulation that prevents or remedies harm to the public health, safety or welfare to require compensation.

Because the text and context of Measure 7 does not necessarily compel the conclusion that regulations the purpose of which is to protect the public health, safety or welfare are regulations that restrict the use of private real property, we also consider the history of the Measure. The history exhibits a fair degree of confusion concerning what the voters expected the Measure would apply to, but at the same time both the proponents and opponents publicly stated that it would apply to a broad range of regulation. In particular, the explanatory statement says that:

Ballot Measure 7 specifically identifies [the affirmative obligations listed in the definition of “reduction in fair market value” in subsection (e)] as regulations requiring payments to landowners. However, its stated coverage is broad enough to cover every regulation, with certain exceptions, that decreases the value of a real property by restricting its use.

Two of the three members of the committee that signed the explanatory statement were representatives of the chief petitioners for the Measure. Voters’ Pamphlet, at 310. The opponents of the Measure and the general news media also appear to have understood that Measure 7 would require compensation for a wide range of governmental regulation, including public health and safety laws that restrict the use of real property.<sup>xvi/</sup> We believe this history supports the conclusion that regulations to protect public health, safety or welfare are covered by Measure 7.

We do not believe, however, that as a general matter Measure 7 requires compensation for the government’s exercise of its taxing powers. In *Terry v. City of Portland*, 204 Or 478, 269 P2d 544 (1954), *appeal dismissed* 348 US 979, 75 S Ct 571, 99 L Ed 762 (1955), the court needed to determine whether a state privilege tax on certain gaming devices was a restriction on use, such that it would preempt local regulation of the use of such devices. The court focused its analysis on two aspects of the statute, whether payment of the tax granted any right or privilege to carry out a use, and whether there was any evidence of a purpose to regulate or restrict the use. The court found that the statute granted no right and would be imposed regardless of whether the use was otherwise legal or illegal, and that under the provisions of the statute

the state can ask him no questions except those related to the collection of the tax. No official is authorized to make discriminations among those who shall be permitted to pay the tax and the places where the machines may be installed. The statute \* \* \* displays no interest in the fitness of anyone to have a machine \* \* \*. Likewise, the act imposes upon an owner no restriction as to the place where he may place his machine for operation or the number he may install. All that the state wants from owners is the amount of the tax. When owners pay the tax, the state issues to them no paper in the form of a license, but hands them a document entitled ‘receipt’. Clearly, the words of the act afford no indication that the measure’s purpose is to regulate \* \* \*.

*Id.* at 503.

Although the court’s analysis in *Terry* involved the question of whether a statute regulated the use of property in a different context, we believe its reasoning is pertinent in determining which laws are regulations that restrict the use of real property for purposes of Measure 7, particularly for tax laws. *Ad valorem* taxation is not concerned with and does not limit what particular uses of real property are allowed and how those uses may be carried out. Instead, such taxes are a general burden on the *ownership*, rather than the use of real property. As a result, we do not believe such taxes fall within Measure 7.<sup>xvii/</sup>

Similarly, regulations that limit or govern conduct or even occupations without regard to the use of real property may incidentally burden the use of real property but they generally do not limit or govern what property may be used for or specifically govern how real property is used. Thus, for example, a regulation that prohibits prostitution is not a regulation that restricts the use of real property, but a regulation that prohibits the use of a building or place for prostitution most likely is. *See* ORS 105.555 (prohibiting use of any place, as a regular course of business, for purpose of prostitution).

In summary, based on the ordinary meaning of the phrase “a regulation that restricts the use of private real property,” the exceptions in the Measure for prohibitions of particular uses of real property, the definition of “real property” in the Measure, the prior case law under Article I, section 18 concerning laws that restrict the use of real property, and the history of the Measure, we conclude that a regulation “restricts the use of private real property” within the meaning of subsection (a) of Measure 7 if it:



- (1) limits or bars the exclusive right of the owner to possess or dispose of the property,
- (2) limits or bars the purposes for which property may be employed or occupied, including prohibitions of particular uses as well as limitations on the circumstances in which a particular use may be established or expanded,
- (3) limits or governs the physical extent to which or the conditions under which property may be employed (whether generally or for a particular purpose), or
- (4) limits or bars the benefit or profit arising from the employment or occupation of the property.<sup>xviii/</sup>

At the same time, we also conclude that regulations that burden the use of property but do not directly limit or prescribe what uses are allowed or how allowed uses are carried out, such as *ad valorem* taxes, general laws governing occupations without regard to how private real property is used, and other civil and criminal laws that generally prohibit or restrict a person's *conduct* not involving the use of property, do not create a right to compensation under Measure 7 even if they may affect or place an burden on private property owners. Finally, because there is nothing in Measure 7 to suggest that a restriction on use must be permanent, we also conclude that a regulation that temporarily restricts the use of private real property in the manner described will also come within the scope of Measure 7.

We recognize that the tests we have articulated to identify regulations that restrict the use of private real property do not present a “bright line” definition, that the particular tests will overlap in some circumstances, and that the determination whether any particular regulation restricts the use of private real property will normally need to be made on a case-by-case basis considering both the law in question and the particular factual circumstances. We also acknowledge that our conclusions are not free from doubt given the open-ended nature of the text and the lack of definitive history of the Measure. To help illustrate the types of regulations that we believe are likely to be within subsection (a) of Measure 7, we provide the following examples from statutes and case law for each of the four categories of regulations that appear to be restrictions on the use of real property. (Note that some of these regulations may come within the exceptions in subsections (b) and (c) of Measure 7, which are discussed in Parts VII and VIII of this opinion, respectively.)

We believe that the *first category* of regulations restricting the use of property – regulations that may limit or bar the exclusive right of the owner to possess or dispose of real property – includes certain provisions of landlord tenant law in ORS chapters 90 and 91 governing the circumstances under which a landlord may evict a tenant; specific requirements in ORS chapter 92 that must be met as a condition of the sale of real property; and similar portions of ORS chapter 446 relating to mobile home parks. Pre-Measure 7 cases alleging that these types of regulations restrict the use of real property in a manner that was a taking include: *Marquam Inv. Corp. v. Beers*, 47 Or App 711, 615 P2d 1064, *rev den* 290 Or 249 (1980) (provisions of Oregon's Residential Landlord and Tenant Act limiting circumstances under which landlords may increase rent, decrease services or evict tenants); and *Cope v. City of*

***Cannon Beach***, 115 Or App 11, 836 P2d 775 (1992), *aff'd* 317 Or 339, 855 P2d 1083 (1993) (ordinance prohibiting rental of dwellings for less than 14 days).

We believe that the *second category* – regulations that restrict the use of private real property by limiting or barring what property may be used for – includes: most traditional zoning laws, farm and forest zoning, ORS chapter 215, and certain other aspects of the statewide land use laws, ORS chapter 197; many nuisance abatement laws, e.g., ORS 105.555, abatement of places of prostitution, lotteries, manufacture of controlled substances, and ORS 479.170, permitting fire marshal to close a “building or premises for use or occupancy” pending compliance with an order to eliminate specified dangerous conditions; prohibitions on the use of real property contaminated by illegal drug manufacturing, e.g., ORS 453.855 to 453.995, and prohibitions on the storage of waste tires, ORS 459.780; and certain other laws prohibiting particular uses in particular circumstances, such as the prohibition of the use of property in tsunami inundation zones for essential facilities, e.g., ORS 455.446(1).

Cases involving regulations that were alleged to have resulted in a regulatory taking of property under the prior text of Article I, section 18, based on a limit or bar on what property could be used for, include: ***State ex rel. Schrunck v. Metz***, 125 Or App 405 (civil forfeiture statutes authorizing seizure and forfeiture of restaurant where illegal gambling alleged to have occurred); ***State ex rel. Haas v. Club Recreation and Pleasure***, 41 Or App 557, 599 P2d 1194 (1979), and ***State ex rel. Haas v. Dionne***, 42 Or App 851, 601 P2d 894 (1979) (nuisance abatement statutes authorizing state to enjoin all use of a property one year following determination that property used for prostitution); ***Shaffer v. City of Winston***, 33 Or App 391, 576 P2d 823 (1978), ***Willard v. City of Eugene***, 25 Or App 491 (ordinances authorizing destruction or removal of abandoned or substandard buildings threatening public safety); ***Lardy v. Washington County***, 122 Or App 361, 857 P2d 885, *rev den* 318 Or 246, 867 P2d 1385 (1993), ***Dodd v. Hood River County***, 317 Or 172 (1993), ***Larson v. Multnomah County***, 121 Or App 119, 854 P2d 476 (1993), and ***Dority v. Clackamas County***, 115 Or App 449, 838 P2d 1103 (1992) (regulations governing uses on farm or forest lands); and ***Multnomah County v. Howell***, 9 Or App 374, 496 P2d 235 (1972) (regulations limiting type of use allowed on a portion of person’s real property).

We believe that the *third category* – regulations that limit or govern the physical extent to which or the conditions under which property may be employed (whether generally or for a particular purpose) – includes: development standards (such as height limits, building setbacks and parking requirements); certain aspects of building codes, including seismic design standards, e.g., Oregon Structural Specialty Code §§ 103a, 3405, chapters 16, 18; some aspects of food safety laws relating to how real property is used, e.g., ORS 616.735; limitations on the fill and removal of material from wetlands on private real property, ORS 196.795 to 196.990; requirements imposed on forest operations, ORS 527.610 to 527.992; regulations restricting access from private real property to public roads, e.g., ORS 374.505; prohibitions on the discharge of air or water pollution without a permit, ORS 468A.040 (air), ORS 468B.025 (water); and certain applications of the environmental crimes statutes, ORS 468.920 to 468.961.

Pre-Measure 7 regulatory takings cases involving this third category include: ***McKay Creek Valley Ass’n v. Washington County***, 114 Or App 95, 834 P2d 482, *adhered to as*

*modified on recon* 116 Or App 299, 841 P2d 651 (1992), *rev den* 317 Or 396, 857 P2d 851 (1993) (regulations requiring owner to plant perennials capable of producing a particular minimum level of annual income before a residence would be allowed on farm land); ***Boise Cascade Corp. v. Board of Forestry***, 164 Or App 114, 991 P2d 563 (1999), *rev den* 331 Or 244, \_\_ P2d \_\_ (2000) (regulations concerning where forest operations may be conducted on real property in order to protect nesting site of endangered species); ***Murray v. Columbia River Gorge Com'n***, 125 Or App 444, 865 P2d 1319 (1993), ***Miller v. Columbia River Gorge Com'n***, 118 Or App 553, 848 P2d 629 (1993) (regulations governing land divisions in Columbia River Gorge); ***American Can Co. v. OLCC***, 15 Or App 618, 517 P2d 691 (1973) (regulations requiring owners of retail stores to accept return of beverage containers (bottle bill)); ***Schoonover v. Klamath County***, 105 Or App 611, 806 P2d 156, *rev den* 311 Or 432, 812 P2d 828, *cert den* 502 US 940, 112 S Ct 375, 116 L Ed2d 327 (1991) (development of subdivision conditioned on annexation to fire district); ***State By and Through Dept. of Transp. v. DuPree***, 154 Or App 181, 961 P2d 232, *rev den* 327 Or 621, 971 P2d 413 (1998), *cert den* 526 US 1019, 119 S Ct 1255, 143 L Ed2d 352 (1999); ***Curran v. State Dept. of Transp.***, 151 Or App 781, 951 P2d 183 (1997), ***Gruner v. Lane County***, 96 Or App 694, 773 P2d 815 (1989), ***Boese v. City of Salem***, 40 Or App 381, 595 P2d 822, *rev den* 287 Or 507 (1979), and ***Oregon Inv. Co. v. Schrunck***, 242 Or 63, 408 P2d 89 (1965) (regulations restricting access to public roads); and ***Benson v. City of Portland***, 119 Or App 406, 850 P2d 416, *rev den* 318 Or 24, 862 P2d 1304 (1993) (ordinance requiring registration and payment of an annual fee for a derelict unoccupied building unless the building was reoccupied).

We believe that the *fourth category* – regulations that may limit or bar the benefit or profit arising from the employment or occupation of real property – includes rent control ordinances allowed under the exemptions of ORS 91.225. We are not aware of any Oregon cases alleging that these types of regulations were a regulatory taking under Article I, section 18 as it existed pre-Measure 7.

With respect to all regulations alleged to restrict the use of real property under Measure 7, it will be necessary to determine whether the regulation as applied to particular real property, restricts the use of that property or merely governs the conduct of persons generally, without regard to the use of the property. For example, we do not believe that a regulation that requires employers to pay minimum wage or that requires employees engaged in handling food to keep their hands clean restricts the use of private real property. And, as noted previously, we do not believe that laws governing how occupations are conducted restrict the use of private real property unless those laws contain specific provisions directed to what real property may be used for or how real property may be used. *See, e.g.*, ORS 654.005 and 654.025 (setting certain requirements for farm worker housing as a component of Oregon’s occupational health and safety laws).

As a final example of a class of laws that may or may not “restrict[ ] the use of private real property,” depending on the particular regulation and how it is applied, we turn to noise regulations. The state regulates noise under ORS chapter 467. The noise control statutes, which include an authorization for cities and counties to adopt more stringent regulations concerning noise, ORS 467.100, generally are directed at conduct rather than specifically at the use of real property. ORS 467.030; OAR ch 340, div 35. However, the rules adopted by the Environmental

Quality Commission are directed in certain respects to particular uses of real property. *See, e.g.* OAR 340-035-0035 (industrial and commercial noise sources). Where these laws govern how the owner of particular private real property may carry out a use of that property, we believe the regulations come within subsection (a) of Measure 7. Where, however, noise regulations simply prohibit creating noise above certain levels, regardless of where or how the noise is created, we believe the regulation is not (at least on its face) a restriction on the use of private real property.

### C. Exception for Regulations that “Prohibit” Certain Activities

The last aspect that we consider with respect to the term “regulation” concerns the exception from compensation in subsection (c) of the Measure, which provides:

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.

We are asked whether this exception applies only to regulations that expressly prohibit the specified uses or also regulations that merely restrict those same activities. Neither the text nor the context of Measure 7 directly answers the question of whether this exception from compensation should be read narrowly or broadly.

This exception applies to regulations “prohibiting” the use of a property for particular purposes. The definitions of “prohibit” are

**1** : to forbid by authority or command : ENJOIN, INTERDICT < the statute [prohibit]ed the employment of workers under 16 years \* \* \* > **2 a** : to prevent from doing or accomplishing something : effectively stop \* \* \* **b** : to make impossible : DEBAR, HINDER, PRECLUDE \* \* \*

WEBSTER'S at 1813. Although one meaning of the term “hinder” in the second definition of “prohibit” may mean to “make slow or difficult,” *id.* at 1070, it is used here in the sense of “to prevent,” *id.*, or to make impossible. Thus, there is nothing in the definitions of “prohibit” that connotes anything less than an absolute bar or interdiction, as opposed to a restriction of the particular use.

Moreover, the Measure uses the related but broader terms “restricts” and “restriction” to describe the regulations for which compensation is required.<sup>xix/</sup> The Measure could have denied compensation for regulations that “restrict” the use of a property for the specified purposes, but it did not. We must treat this difference in language as if it is significant in the interpretation of the Measure. *See Armatta v. Kitzhaber*, 327 Or 250, 262, 959 P2d 49 (1998) (stating rule); *see also School Dist. 1, Mult. Co. v. Bingham et al.*, 204 Or 601, 611, 283 P2d 670, *adhered to on rehearing*, 204 Or 601, 284 P2d 779 (1955) (when interpreting Oregon Constitution, court must assume that every word has been inserted for some useful purpose).

Although Measure 7 could have expressly commanded a broad reading of this exception from compensation, the text of the Measure does not do so. In contrast, subsection (b) of the Measure contains an express instruction to narrowly construe the exception for “historically and commonly recognized nuisance laws” to favor compensation. We have found nothing in the context or history of the Measure that would support a broad interpretation of subsection (c).

Given the Measure’s use of the word “prohibiting” in contrast to its use of “restricts” and “restriction,” we conclude that the exception in subsection (c) of Measure 7 includes only those regulations that expressly prohibit the listed activities. Regulations that merely restrict those activities or make them impractical are not within the exception. This reading best gives meaning to the specific terms used in the Measure.

### **III. Events that Trigger Compensation**

This next set of questions concerns the provisions in Measure 7 that trigger the right to compensation. Subsection (a) of Measure 7 creates a right to compensation when state or local “government passes or enforces a regulation” that restricts the use of private real property in a manner that reduces its value. Subsection (d) of Measure 7 then states that compensation is due if the regulation “was adopted, first enforced or applied” after the current property owner became the owner and if the regulation “continues to apply to the property” 90 days after the owner applies for compensation.

#### **A. Government Actions Taken before the Effective Date of Measure 7**

Measure 7 does not expressly state whether it is intended to create a right to compensation based on governmental acts occurring before the Measure’s effective date. The wording of subsection (a) of the Measure strongly suggests, however, that a right exists only if some government action takes place after the effective date of Measure 7. Specifically, the text of subsection (a) of Measure 7 uses the present tense – the right to compensation for restrictions on use and reductions in value resulting from such restrictions accrues if the “government passes or enforces a regulation.” *Newell v. Weston*, 150 Or App 562, 946 P2d 691 (1997), *rev den* 327 Or 317, 966 P2d 221 (1998) (one indicator of intention is the tense in which statute has been written). The language “[i]f the \* \* \* government passes or enforces” speaks prospectively to actions or circumstances in the future.

Although the use of the present tense in subsection (a) of Measure 7 is a strong indication that the voters intended it to apply only to claims based on government actions occurring after Measure 7 takes effect, other text in the Measure could be read to the contrary. Specifically, subsection (d) provides that “[c]ompensation 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.” (Emphasis added.)

In interpreting a constitutional measure, we rely upon the textual rule of construction that where there are several provisions, a court will adopt that construction which gives effect to all provisions. ORS 174.010. Reading the text of subsections (a) and (d) of Measure 7 together so as to give effect to both provisions, we conclude that subsection (a) establishes what government

actions create an inchoate or potential right to compensation, and subsection (d) establishes the conditions necessary for particular owners to qualify to exercise that potential right as to particular property. The conditions in subsection (d) are a limitation defining which owners may exercise the potential right created by subsection (a). The first part of subsection (d) limits the right to owners who become owners of property after the regulation was “adopted, first enforced or applied,” and the second part of subsection (d) further limits the right to owners of property as to which the regulation in question continues to apply 90 days after the owners apply for compensation. Nevertheless, we believe that the use of conflicting verb tenses in subsections (a) and (d) of Measure 7 makes the text of the Measure sufficiently ambiguous with regard to its application that it is appropriate to look beyond the text of the Measure to its history.

The ballot title and explanatory statement for Measure 7 do not speak to whether the acts of adopting or enforcing a regulation give rise to a right to compensation if they occurred before the effective date of the Measure.<sup>xx/</sup> Similarly, nothing in the arguments for or against the Measure, or in the media coverage, speaks directly to whether the Measure was intended to apply to governmental actions before the effective date of Measure 7.<sup>xxi/</sup>

When the voters’ intent remains ambiguous after examining the text, context and history of a measure, we resort to judicial rules of construction as an aid to determining intent. There are at least three such rules that may be pertinent to whether Measure 7 applies to governmental actions that occurred before its effective date: first, a presumption that constitutional amendments apply prospectively, *State v. Lanig*, 154 Or App 665, 675, 963 P2d 58 (1998); second, a presumption that unless mandated by the terms of the act, retroactive construction should not be applied if doing so will “impair existing rights, create new obligations or impose additional duties with respect to past transactions,” *Multnomah County v. \$56,460 in U.S. Currency*, 100 Or App 144, 148, 785 P2d 367, 369 (1990); and, finally, a presumption that retroactive effect is to be given only to statutes that are “remedial” or “procedural,” as opposed to “substantive,” in nature. *Whipple v. Howser*, 291 Or 475, 491-92, 632 P2d 782 (1981).

In *Lanig*, the Oregon Court of Appeals determined that a constitutional amendment, Ballot Measure 40 (1997) providing that victims in all criminal prosecutions have the right to have all relevant evidence admissible against a defendant, did not apply to cases pending at the time Measure 40 was enacted. In so doing, the court relied at least in part on a general presumption that constitutional amendments apply prospectively. 154 Or App at 675-676. The court noted that retroactivity clauses “are neither technically abstruse nor difficult to draft in practice. They are common and are employed frequently both by legislatures in enacting statutes and by the people in enacting statutes and constitutional amendments.” *Id.* at 670. “The absence of any such provisions, therefore, strongly suggests that the measure was not intended to apply to cases pending upon enactment.” *Id.* at 671 (citations omitted). As with Measure 40, the people did not include a clause in Measure 7 expressly creating a right to compensation for governmental actions taken before the effective date of the Measure. As a result, this rule of construction indicates that the Measure should be construed to apply only to actions occurring after its effective date.

The second rule of construction that may apply to the issue of whether a right to compensation is created by government actions that occurred pre-Measure 7 is that “[u]nless

retroactive construction is mandatory by the terms of the act, it should not be applied if such construction will impair existing rights, create new obligations or impose additional duties with respect to past transactions.” *\$56,460 in U.S. Currency*, 100 Or App at 147-148 (citing *Kempf v. Carpenters and Joiners Union*, 229 Or 337, 343, 367 P2d 436 (1961)). We believe that if Measure 7 were construed to create a right to compensation for passing or enforcing a regulation before the Measure’s effective date, it would create new obligations or impose additional duties with respect to past transactions. Measure 7 expands the circumstances in which the owners of private real property have a right to compensation. Under Article I, section 18, of the Oregon Constitution as it existed before Measure 7, owners of private real property had a right to compensation for a regulatory “taking” only if the regulation precluded all substantial beneficial use of their property or required an owner of property to allow the government or third parties to occupy their property. See, e.g., *Dodd v. Hood River County*, 317 Or 172, 182 (1993) (all substantial beneficial use); *Ferguson v. City of Mill City*, 120 Or App 210, 852 P2d 205 (1993) (physical occupation). Measure 7 extends that right, with certain exceptions, to regulations that restrict the use of private real property where that restriction reduces the value of the property, without regard to whether the owner still has some substantial beneficial use of the property. Thus, Measure 7 creates a new right to compensation, a right relating to actions that were not previously compensable as a taking. As a result, reading the Measure to create a right resulting from the passage or enforcement of regulations before its effective date would create new rights and obligations arising out of past transactions. The rule of statutory construction in Oregon is that such enactments should be applied prospectively, “without regard to whether the change is ‘remedial’ or ‘substantive.’” *\$56,460 in U.S. Currency*, at 148, citing *Joseph v. Lowery*, 261 Or 545, 549, 495 P2d 273 (1972).

Although *\$56,460 in U.S. Currency* casts doubt on whether we should even consider the *Whipple* rule that “remedial” or “procedural” enactments, as opposed to “substantive” ones, should be construed to apply retroactively, the courts have continued to apply this presumption to statutes in cases where the intent of the legislature is not clear, and we presume that it may apply to enactments of the voters as well. In *Vloedman v. Cornell*, 161 Or App 396, 984 P2d 906 (1999), the Oregon Court of Appeals determined that a statute, ORS 105.810(2), was remedial or procedural rather than substantive, and therefore, retroactive. It is clear that Measure 7 is not simply procedural. The question is what is a “remedial” enactment, and is Measure 7 such an enactment?

The Supreme Court has explained that, at least in the context of determining the retroactivity of statutes, “remedial” statutes are those “which pertain to or affect a remedy, as distinguished from those which affect or modify a substantive right or duty.” *Perkins v. Willamette Industries*, 273 Or 566, 571 n 1, 542 P2d 473 (1975).

*Vloedman*, at 401. The statute in question in *Vloedman* was an amendment to ORS 105.810, which provides property owners a statutory remedy for the unlawful taking of crops. The amendment in question did not affect what conduct was unlawful. Instead, it allowed prevailing plaintiffs to recover attorney fees, without affecting the scope of what was prohibited. *Id.* In contrast, the court in *Perkins* addressed an amendment to Oregon’s workers’ compensation laws that occurred during an appeal of a particular case. The amendment repealed a restriction on

third party actions in a manner relevant to the case. The court held that expanding the rights of third parties in such cases was a “substantial change” that would not be applied retroactively to a pending case in the absence of an express legislative direction to do so. 273 Or at 570-571.

In the case of Measure 7, as explained in Part II B of this opinion above, the constitutional amendment not only alters the remedy for inverse condemnation resulting from regulatory actions of government; Measure 7 also, and much more fundamentally, alters what governmental actions require a remedy in the first instance. As a result, we believe a reviewing court is highly likely to treat Measure 7 as a substantive enactment and presume under this rule of construction, as well as the first two, that the voters, to the extent they considered the matter at all, intended that only governmental actions taken after the effective date of the Measure would give rise to a right to compensation.<sup>xxiii/</sup>

In sum, based on the voters’ use of the present tense in subsection (a) of Measure 7, and the rules of construction where intent is not clear, we conclude that the right to compensation created by Measure 7 applies prospectively, i.e., where the government passes or enforces a regulation after the effective date of Measure 7. Measure 7 does not create a right to compensation if both of those government actions were taken before the Measure’s effective date.

## **B. Government “Passes or Enforces” a Regulation**

Subsection (a) of Measure 7 provides that compensation shall be paid if “government passes or enforces a regulation that restricts the use of private real property,” where the restriction reduces the value of a particular property. This text of subsection (a) of the Measure creates a potential right to compensation for two government actions related to regulations that restrict the use of property in a manner that reduces its value – either when government *passes* such a regulation or when government *enforces* such a regulation. We are asked what is meant by each of these actions.

### **1. Government Passes a Regulation**

In the context of legislation, the term “pass” means “to secure the allowance or approval of a legislature or other body that has power to sanction or reject a bill or proposal.” WEBSTER’S at 1649. Thus, government “passes” a regulation that restricts the use of property in a manner that reduces its value when government performs the legislative or quasi-legislative act of approving such a regulation. A claim that the act of passing a law restricts the use of property is akin to what has traditionally been known as a facial taking claim. *See, e.g., Cope v. City of Cannon Beach*, 317 Or 339, 855 P2d 1083 (1993). Subsection (a) of Measure 7 clearly creates a right to compensation in this situation – when government approves a regulation that on its face restricts the use of private real property and other requirements of the Measure are met.

### **2. Government Enforces a Regulation**

Ascertaining when government “enforces” a regulation so as to give rise to a right to compensation under subsection (a) of Measure 7 is more difficult. The relevant definition of the



term “enforce” is “to put in force : cause to take effect.” WEBSTER'S at 751. In contrast to the term “implement,” which suggests the performance of acts necessary to bring some plan into actual operation, “enforce refers to requiring operation, observance or protection of laws, orders, contracts, and agreements by authority, often that of a whole government or of its executive or legal branches.” *Id.* Thus, the ordinary meaning of the verb “enforce” is to put into force or to require observance of something, in this case any governmental regulation restricting the use of real property.

Perhaps the most common means for government to enforce a regulation is to compel compliance with it through a direct judicial or administrative action. *See, e.g., Clackamas County v. Marson*, 128 Or App 18, 874 P2d 110, *rev den* 319 Or 572, 879 P2d 1286 (1994) (ORS 197.825(3)(a) enables local governments and the public to compel compliance with local land use legislation through an action in circuit court); *Wygant v. Curry County*, 110 Or App 189, 821 P2d 1109 (1991) (county governing body’s motion to seek injunctive relief in circuit court under ORS 197.835(3)(a) started an enforcement proceeding). The act of putting into force or requiring observance of a regulation is not restricted to direct judicial or administrative action compelling compliance with the law, but also includes preventative actions. *See Dept. of Transportation v. City of Mosier*, 161 Or App 252, 984 P2d 351 (1999) (local code and ORS 227.280 authorize city’s *sua sponte* determination whether gravel operation was valid non-conforming use, where city’s determination was not self-executing to compel compliance); *Marks v. City of Roseburg*, 65 Or App 102, 105-106, 670 P2d 201, *rev den* 296 Or 536, 678 P2d 738 (1983) (city’s informing plaintiff that conduct was prohibited by ordinance gave plaintiff standing to bring a declaratory judgment action, where ordinance on its face prohibited conduct that plaintiff wanted to carry out).

State and local government may also “enforce” a law where the law grants the governmental entity permissive authority to require or not require particular action and the entity decides to exercise that authority. *See, e.g., Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624, 631-32, 4 P3d 748 (2000) (Water Resources Commission authorized, but not required by ORS 536.037, to undertake particular implementation and enforcement actions). Finally, state or local government may “enforce” a broad legislative standard by subsequent quasi-judicial action to apply or implement that standard as to a particular case. *See Anderson v. Peden*, 30 Or App 1063, 1068-69, 569 P2d 633 (1977), *aff’d* 284 Or 313, 587 P2d 59 (1978) (broad standards enforced through action on particular land use application).

In short, under Oregon law, there are many means by which government may “enforce” regulations that restrict the use of private real property. Although it is questionable whether any particular legal meaning of the term “enforces” should be used in place of the common and ordinary meaning of the word, the breadth of the legal usage of the term in Oregon illustrates the range of ways in which government can enforce a regulation.

There are several indications in the text of Measure 7 that the broad meaning of the term “enforces” described above was intended by the voters. Subsection (c) of the Measure provides an exception from the requirement for compensation for regulations implementing a requirement of federal law. The operative words of the exception are that “[a] regulating entity may *impose*

\* \* \* a regulation to implement a requirement of federal law.” (Emphasis added.) There is no basis in the text of the Measure to believe that the voters did not intend this exception to apply both to the passing and enforcing of regulations under subsection (a). The ordinary meaning of the word “impose” is to apply as compulsory, obligatory or enforceable.<sup>xxiii/</sup>

Similarly, subsection (d) of Measure 7, which specifies the conditions necessary for a property owner to qualify for compensation, refers to the regulation continuing “to apply to the property.” And, in defining the reduction in fair market value, subsection (e) uses the language “before and after application” of the regulation. The ordinary meaning of “apply” and “application” includes the use of something in a particular situation, putting something into effect, and clarifying or elucidating a general statement.<sup>xxiv/</sup> We can discern no basis in the text, context or history of the Measure to exclude any of these meanings of the operative terms and believe that they indicate a general intent of the voters that any governmental action to give force or effect to a regulation, other than the act of passing a regulation, is within the meaning of the term “enforces” as it is used in subsection (a).

Although not free from doubt, we do not believe that *government* “enforces” a regulation within the meaning of Measure 7 when government simply allows a regulation to remain in effect and there is a means by which a private party may compel a property owner to comply with the regulation. Subsection (a) requires compensation when the “government \* \* \* enforces” a regulation, not when a regulation is generally applicable to property in a manner that gives rise to a third party private right to compel compliance with the law. Interpreting subsection (a) to include such circumstances would effectively create new obligations or impose additional duties with respect to past transactions (here, the prior enactment of laws). As we conclude above, the courts are not likely to imply retroactive application of Measure 7, and we believe that interpreting subsection (a) to give rise to a right to compensation where *government* has not taken any action post-Measure 7 would result in retroactive application of the Measure. Based on the wording of subsection (a) and the applicable rules of construction,<sup>xxv/</sup> we believe that subsection (a) requires an affirmative act of government after the effective date of Measure 7, to trigger a potential right to compensation.

In conclusion, based on the ordinary meaning of the term “enforces,” the broad language used in other operative portions of Measure 7, and the rules of construction, we conclude that subsection (a) of Measure 7 creates a potential right to compensation due to government’s *enforcing* a regulation when government takes any action to put into force or require observance of a regulation (other than adopting or passing one). Such actions include, but are not limited to: compelling compliance through a direct judicial or administrative action, acting in certain ways to prevent or discourage violations, electing to exercise permissive authority to regulate in a particular case, and clarifying a general regulatory standard through a subsequent adjudicative proceeding.

The remaining question is whether the potential right to compensation under subsection (a) of Measure 7 when government “enforces” a regulation is triggered only when government enforcement is directed at the claimant’s property or whether enforcement of the regulation generally is sufficient. We believe that the text of the Measure provides the answer. The potential right to compensation arises when “government \* \* \* enforces a regulation that restricts

the use of private real property”; this clause refers to the general effect of a regulation. Yet the right to compensation is further dependent on the restriction resulting from the enforcement of the regulation having “the effect of reducing the value of a property upon which the restriction is imposed.” (Emphasis added.) The use of the indefinite article “a” in subsection (a) rather than the definite article “the,” together with the general verb “impose” suggests that the voters did not intend to require that the government enforcement action necessarily be directed at the property for which compensation is being sought as a precondition to compensation. While this answer is not free from doubt, we believe it is likely that a court would conclude that government action to enforce a regulation as to any property will give rise to a right to compensation under subsection (a) as to all properties subject to the regulation.<sup>xxvi/</sup>

### **C. Enforcement After Measure 7 of a Regulation Adopted Before Measure 7’s Effective Date**

Reading the text of subsections (a) and (d) of Measure 7 together, it is clear that if, after Measure 7’s effective date, a government enforces a regulation that restricts the use of private real property in a manner that reduces its value, and that regulation was adopted *after* the current owner became the owner and continues to apply to the property 90 days after the owner applies for compensation under Measure 7, compensation is due to that owner for any reduction in fair market value.

There is nothing in the text or context of Measure 7 to suggest that it does not include the right to compensation for the future enforcement of regulations adopted before Measure 7’s effective date, as well as new ones. This is simply the prospective application of a new constitutional right. “[A]ll new laws operate upon a state of affairs formed to some extent by past events.” *Whipple v. Howser*, 291 Or at 488-89 (Linde, J., concurring). In subsection (e), Measure 7 defines the term “regulation” as including “*any* law, rule, ordinance, resolution, goal, or other enforceable enactment of government.” (Emphasis added.) There is no express temporal limitation on which regulations are included within the definition of that term in subsection (e), or in the use of that term in subsection (a), and we find nothing in the context of the Measure to suggest that the voters intended one.

To the extent there is any ambiguity, the explanatory statement for the Measure in the Voters’ Pamphlet makes it clear that “Ballot Measure 7 requires payment to a landowner if an *existing* or future regulation was \* \* \* first enforced or applied after the current owner became the owner and still applies to the property 90 days after the owner seeks payment.”<sup>xxvii/</sup> (Emphasis added.) We believe it is clear from this history of the Measure that the voters intended the Measure to require compensation for the future (post-Measure 7) enforcement of existing (pre-Measure 7) regulations, where the regulation was “adopted, first enforced or applied” after the owner in question became the owner.

Accordingly, although we conclude above in Part III A, that Measure 7 is not “retroactive” in the strict sense, it has the potential for what could be considered retroactive effect in that it applies to laws adopted before Measure 7. This effect is especially significant where state agencies are required to enforce regulatory programs. (The authority of state agencies to forego enforcement of regulations is discussed below in Part VI of this opinion.)

**D. Regulation “Adopted, First Enforced or Applied” After Current Owner of the Property Became the Owner**

Once government passes or enforces a regulation after the effective date of Measure 7, subsection (d) of the Measure determines *who* qualifies to exercise the right to compensation. Subsection (d) clearly states that an owner qualifies for compensation if the regulation that restricts his or her use of the property was “adopted” after he or she became the owner of the property.

The more difficult question is whether, under subsection (d) of Measure 7, a current owner of a property who became the owner after the regulation in question was adopted, but before the regulation was “first enforced or applied” as to the owner’s specific property will qualify for compensation, or whether a current owner of a property who became the owner after the regulation was adopted will qualify for compensation only if the current owner became the owner of the property before the regulation had ever been enforced or applied as to *any* property subject to the regulation.

For the reasons set forth below, we doubt that the voters intended property owners to qualify for compensation simply because a prior owner of the same property had not previously been compelled to comply with the law, and we conclude that the courts are likely to determine that Measure 7 bars compensation to owners who acquired their property after the regulation in question had been enforced or applied as to any property.

We conclude above that the phrase “government \* \* \* enforces a regulation” in subsection (a) means the first time after Measure 7 that the government takes any action to give force or effect to a regulation as to any property and that the phrase does not require government action directed at the claimant’s property. We now reach a similar conclusion with respect to subsection (d)’s phrase “the regulation was \* \* \* first enforced or applied after the current owner \* \* \* became the owner.” While it is plausible that the voters intended subsection (d) to allow owners to qualify for compensation unless the regulation had previously been specifically enforced or applied to their property before they became the owner, there are several reasons why we believe the voters did not intend this result.

First, making an owner’s qualification for compensation dependent on whether there had been specific action to enforce or apply the regulation to the property for which compensation is sought would essentially alter the text of subsection (d) by requiring the insertion of the words shown in bold as follows: “compensation shall be due the property owner if the regulation was adopted, first enforced or applied **to the property** 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.” In interpreting a constitutional provision, we are not to insert what the voters have omitted. ORS 174.010.

Second, every person is presumed to know the law. *Dungey v. Fairview Farms, Inc.*, 205 Or 615, 621, 290 P2d 181 (1955). “It is a basic assumption of the legal system that the ordinary means by which the legislature publishes and makes available its enactments are sufficient to inform persons of statutes that are relevant to them.” *Bartz v. State*, 314 Or 353,

359-60, 839 P2d 217 (1992). In a similar fashion, the history of Measure 7 appears to indicate that the voters intended that owners who acquire their property are charged with knowing what regulations restrict or may restrict their use of that property. As stated by one of the proponents of Measure 7 in his argument in support of the Measure: “That’s why most people are very careful when they buy property. You check to make sure that you can use your land before paying for it. After all, you want to be sure that the property can be used for a home, business, or farm or whatever else you had in mind.” Argument in Favor, Ballot Measure 7, Bill Moshofsky, Just Compensation For Regulatory Takings Committee.<sup>xxviii/</sup>

The phrase “was \* \* \* first enforced or applied” encompasses a wide range of actions and government-created conditions that can occur after a regulation is adopted and which give force or effect to a law. Such actions and conditions range from enacting a means by which a previously-adopted law may be made compulsory, to deciding to exercise permissive authority previously granted,<sup>xxix/</sup> to applying a general law in a manner that gives it specific force,<sup>xxx/</sup> to bringing or requiring or allowing a specific action implementing a law as to a particular property. Nothing in the text of subsection (d) states or suggests that only the last of these ways in which a law may be “first enforced or applied” was intended by the voters, and then only as to the property for which compensation is sought. Instead, we believe the clause “first enforced or applied” refers to the full range of the actions and circumstances described above, and as to any property and not necessarily the property of the claimant.

Thus, based on the text and the limited history of Measure 7, we conclude that the voters intended the phrase “was first \* \* \* enforced or applied after the current owner \* \* \* became the owner” to mean that any action by any government entity as to any property subject to the regulation to carry the regulation into force or effect precludes owners who acquired their property after that action from qualifying for compensation.<sup>xxxi/</sup>

We acknowledge that this portion of the Measure is particularly ambiguous and that our conclusion significantly limits the number of owners who will qualify for compensation. If the courts determine that any owner who became an owner before a regulation was enforced or applied to the owner’s specific property qualifies for compensation, the effect of the Measure will be far greater. Nevertheless, based on the sources of information available and the rules of construction, we believe that this is the conclusion the courts would most likely reach.

In summary, we do not believe that the voters intended Measure 7 to compensate property owners who acquired their property knowing that a law restricted their use of the property, but before a specific government action to “enforce or apply” the law had been directed at their particular property. Although it is a close question, we believe the courts are likely to determine that the voters intended that only owners who became owners before a regulation was first enforced or applied generally have a right to compensation.

#### **E. Regulation “Continues to Apply to the Property”**

The final clause of subsection (d) of Measure 7 provides that “[c]ompensation shall be due the property owner if the regulation \* \* \* continues to apply to the property 90 days after the owner applies for compensation under this section.” We believe that the voters intended the

phrase “continues to apply to the property” to mean that the regulation is still in general legal effect and is legally capable of being enforced to restrict the use of the property by any means, whether by direct government action or indirectly through a private right to compel compliance with the regulation.

In the answer to the prior question concerning the meaning of “first enforced or applied” we concluded that this language in the first portion of subsection (d) encompasses any action or circumstance that gives force or effect to the regulation in question. In addition, the term “was adopted” extends the first portion of subsection (d) to the governmental action of adopting a regulation where the regulation by its terms restricts the use of private real property. It is clear that the voters used the term “apply” in the second clause of subsection (d) to encompass all of the actions and circumstances within the first clause of the subsection. In other words, unless the voters intended “continues to apply” to encompass all of the things included in “adopted, first enforced or applied,” they would have created a right in the first clause that is not carried into effect in the second clause. We must read the Measure to give effect to all of its parts, ORS 174.010, and the only way of doing so is to read “apply” as including all of the actions and circumstances within “adopted, first enforced or applied.”

Although the text of subsection (a) of the Measure clearly creates a potential right to compensation for owners affected by the governmental acts of passing or enforcing a regulation, the usage of “continues to apply” in the second portion of subsection (d) indicates that the act of passing or enforcing, standing alone, is not sufficient to create a right to compensation. Under the second portion of subsection (d), compensation is due only if the regulation “continues to *apply* to the property.” (Emphasis added.) Similarly, the definition of “reduction in fair market value” in subsection (e), which is used in subsection (a) to define what compensation is due, uses the words “value of the property before and after *application* of the regulation.” (Emphasis added.) In short, the text of the Measure taken as a whole requires both the passage or enforcement of a regulation and the government’s failure to stop application of the regulation as to the particular property for which compensation is sought, in order for the right of that particular owner to mature.

In some cases, we believe that the only certain means by which state government can stop a regulation from “continuing to apply” to the property is by repealing it. Although the executive branch of government may assure an owner of the property that it will not initiate an action to enforce the regulation as to the owner, in many circumstances the executive branch can be compelled to act by third parties. *Cordill v. City of Estacada*, 67 Or App 481, 678 P2d 1257 (1984) (third party could require city to enforce its zoning code through mandamus proceeding, although the court would not direct the city how to act). Where the law requires the government to apply the regulation in some manner, the executive’s assurance does not stop the application of the regulation. Government can be compelled to act to apply such regulations. ORS 34.110, 183.490, 197.825(3), 215.185.<sup>xxxiii</sup> And, in those cases where the legislature has provided for private enforcement of regulations, even where the executive fails to act, private persons can “enforce” the regulation directly through judicial action. (In Part VI A 3 of this opinion, we address the effect of the debt limit in Article XI, section 7, of the Oregon Constitution on regulations that may “continue to apply” even without government enforcement.)

## F. Completion of Government Application Process

When a regulation requires a property owner to apply to the government for authorization for a desired use of the property, whether the owner will have to complete the governmental process before the owner has a claim for compensation under Measure 7 will depend on the basis of the owner's claim for compensation and the nature of the regulation in question. As we noted above, if an owner is seeking compensation for the governmental act of "passing" a regulation, whether the owner has a valid claim under Measure 7 will depend on whether the regulation, on its face, restricts the use of the owner's property. If it does, we see no reason why the owner need apply for authorization for a particular use of the property before seeking compensation. *Cope v. City of Cannon Beach*, 317 Or at 342. Similarly, if an owner is applying for compensation based only on the delay caused by having to complete a governmental application process before carrying out a use, nothing in Measure 7 appears to require that the process be completed before a claim is made. Such a requirement in itself constitutes a restriction on use because the use is prohibited without the process. In this circumstance, it may be difficult to prove the extent to which the regulation reduces the value of the property, but that proof problem alone does not prevent an owner from making a claim as long as the regulation on its face requires a review process.

Measure 7 is silent on the question of whether it grants a right to compensation in a circumstance where the regulation in question *may*, under some circumstances, restrict or prohibit a particular use or an aspect of a particular use. The text of subsection (a) provides a right to compensation if the 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." Laws authorizing a government to allow a use if particular conditions are satisfied, or authorizing a use if the use is carried out subject to conditions, are not uncommon. In most cases, such laws involve discretion or subjective judgment as to whether the required conditions have been met or as to what conditions to impose on the use. In these cases, there are two ways in which the law operates: (1) by requiring the owner to go through a process, and (2) by authorizing the government to prohibit a use or impose limitations on a use based on the application of standards to the facts of the case. We have already noted that under Measure 7 an owner may seek compensation based on the mere restriction of having to complete the process, because that restriction is not contingent in any manner. The only question is the extent of the restriction in terms of time required to complete the process, and the resulting effect on value, if any.

As to the second, substantive, aspect of permissive or conditional regulations, it will not normally be possible to determine whether such a regulation will, in fact, restrict the use of a property until the government acts. The answer will depend on whether the government entity conducting the review process has discretion to determine whether or not to impose a restriction or the extent of the restriction. If it does, then the regulation may or may not restrict the use, depending on the outcome of the process.

The text of Measure 7 does not distinguish between laws that restrict the use of private real property on their face, and laws that may restrict the use of property depending on governmental discretion in applying the law to particular cases. Rather, Measure 7 simply

requires compensation “[i]f \* \* \* government passes or enforces a regulation that restricts the use of private real property.”

In this setting, we believe it is appropriate to look to case law under Article I, section 18, of the Oregon Constitution as context for whether a claim may be made for a regulation that may, under some circumstances, restrict the use of private real property. Before Measure 7, the Oregon courts construed this provision of the Oregon Constitution to require that a taking claim be “ripe” in the same manner as required under the Fifth Amendment to the United States Constitution. Most recently, in deciding a case brought under the Fifth Amendment, the Oregon Court of Appeals quoted the following seminal articulation of this requirement by the United States Supreme Court:

“a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”

*Boise Cascade Corp. v. Board of Forestry*, 164 Or App at 129 (quoting *Williamson Planning Comm’n v. Hamilton Bank*, 473 US 172, 186, 105 S Ct 3108, 87 L Ed2d 126 (1985)). This formulation of the ripeness doctrine has been applied as well to Article I, section 18, of the Oregon Constitution. *Curran v. State Dept. of Transportation*, 151 Or App 781, 786-787, 951 P2d 183 (1997); *Nelson v. City of Lake Oswego*, 126 Or App 416, 424-425, 869 P2d 350 (1994). Until there is a final and authoritative determination of the type of use legally permitted, it is impossible to determine whether there has been a loss of *all* use and therefore a taking. *Id.* at 422.

By granting a right to compensation for *any* restriction of use that reduces fair market value no matter how slightly, Measure 7 disposes of that aspect of the ripeness doctrine that ensures that the government will allow no substantial beneficial use of the property. However, Measure 7 does not obviate the need when dealing with a regulation that may or may not restrict the use of property (as a result of a variance procedure, or through discretion given the decision-maker whether to apply or not apply the restriction) to first determine whether the government will in fact restrict the use at all.

Where the regulation in question clearly prohibits or limits the use of real property in some substantive manner, and there is no discretion on the part of the government as to whether the regulation applies, there is no basis to require government action before compensation is sought. Even if the government has discretion regarding what means it may use to enforce a mandatory regulation, *Cordill*, 67 Or App at 486, the restriction will have been “enforced” as we believe the voters intended under Measure 7, and the right to seek compensation will accrue, once government enforces the regulation generally. See also *Marks v. City of Roseburg*, 65 Or App at 105-106 (justiciable controversy exists where plaintiffs informed by government officials that their intended use of property was prohibited by city ordinance).

In contrast, however, where the regulation leaves the government with discretion regarding whether the use will be prohibited or restricted at all, we believe the property owner



must complete the government's application and review process before the owner has a right to compensation under Measure 7 beyond any compensation due solely to the mere requirement to apply for authorization. The voters could have provided a right to compensation for regulations that *may*, under some circumstances, restrict the use of property, but they did not. Based on the text of the Measure, and the doctrine of ripeness under Article I, section 18, of the Oregon Constitution, as modified by Measure 7, we believe that there is no right to compensation for such regulations until the government responsible for administering the regulation has made it clear whether or how the regulation applies to the particular property in question.

#### IV. Property Owner

We are next asked who is a "property owner" who may qualify for compensation under Measure 7. The term "property owner" appears in both subsections (a) and (d) of Measure 7, which provide:

(a) If \* \* \* 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 \* \* \* .

\* \* \* \* \*

(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.

(Emphasis added.) It is clear from the text that the term "property owner" in subsection (a) refers to the owner of the previously described "private real property," the use of which is restricted. The "property owner" and the "owner of the property" in subsection (d) can only be interpreted as references back to the owner of the private real property identified in subsection (a).

Although the Measure does not define "property owner" or "owner of the property," subsection (e) contains the following definition of "real property":

"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 \* \* \* .

This definition is somewhat circular in that the word "property" is part of the definition of "real property." "Real property" includes structures built "on the property" and crops grown "on the property." From this definition, it is apparent that "the property" cannot be a structure or a crop alone, since those things are *on* "the property." Therefore, the "property owner" must be the owner of what those things are on, i.e., the land. Although "real property" includes items on the land, the "property owner" entitled to compensation under Measure 7 is the owner of the land.

This interpretation is further supported by the definition of “fair market value” in subsection (e), which states:

“reduction in the fair market value” \* \* \* 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 \* \* \* .

(Emphasis added.) The use of the term “landowner” in this definition implies that the party claiming compensation, i.e., the property owner, is the owner of the land.

In the General Condemnation Procedures Act, ORS chapter 35, which provides procedures for the state to take property through the exercise its power of eminent domain, the term “owner” or “owner of the property” is defined as the owner of “real or personal property *or any interest therein* of any kind or nature, that is subject to condemnation.” ORS 35.215(2), (5) (emphasis added). If that definition applied to Measure 7, the holder of any interest in real property would have standing to assert a Measure 7 claim. But the definitions in ORS 35.215 are limited by the terms of that statute to ORS chapter 35. Measure 7 does not incorporate or refer to ORS chapter 35; instead, Measure 7 has its own definitions. Significantly, the definition of “real property” in Measure 7 makes no reference to *interests* in real property. In interpreting a constitutional provision, we are not to insert what the voters have omitted. ORS 174.010.

Thus, based on the text of Measure 7, we conclude that the “property owner” who may be paid compensation is the owner of the land. The explanatory statement in the Voters’ Pamphlet supports this interpretation. It states in relevant part: “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.” (Emphasis added.) Consequently, the owner of an interest in a forest product or crop, for example, who does not own the land on which they grow, or the owner of a building on leased land, would not have a claim for compensation under the Measure.<sup>xxxiii/</sup>

## **V. Agency Authority to Pay Measure 7 Claims**

This set of questions concerns the authority and appropriations necessary for a state agency to pay compensation to property owners who file claims under Measure 7. Specifically, we are asked which state agency(ies) may pay a Measure 7 claim and whether a state agency may use funds appropriated for the payment of tort claims or the state’s condemnation of private property to pay such claims. We discuss each of these questions below.

### **A. Authority to Pay and Appropriations**

In Part I of this opinion, we conclude that funds used to pay Measure 7 claims would be drawn from moneys in the State Treasury. Under ORS 293.295, moneys held in the State Treasury may be used to pay claims, including Measure 7 claims, only if the agency that incurred the obligation approves the claim and provision for payment of the claim is made by law and appropriation. ORS 293.295(1), (2). From these requirements, we conclude that before the

agency that incurred an obligation may approve payment of a claim, the agency must have the authority to pay the claim and must have an appropriation from which the claim may be paid. We examine each of these elements in turn.

## 1. Authority

A state agency “has no inherent power, but only such power and authority as has been conferred upon it by its organic legislation.” *Ochoco Const., Inc. v. Department of Land Conservation and Development*, 295 Or 422, 426, 667 P2d 499 (1983). Therefore, an agency may not pay a claim unless it has been given either constitutional or statutory authority to do so. Although Measure 7 requires payment of compensation to property owners under certain circumstances, the Measure does not authorize any particular agency to make such payments. We have identified no statutes that expressly provide an agency with authority to pay Measure 7 claims.

In *Ochoco*, the court recognized that an agency’s power includes not only that expressly conferred by statute but also “such implied power as is necessary to carry out the power expressly granted.” *Id.* In recognizing an agency’s implied power to act, *Ochoco* adhered to a principle repeatedly expressed by the court over many decades. In 1912, the court held that the City of Portland had authority to employ a special consulting engineer when it was deemed “expedient and necessary” to do so, although the city charter specified that the city engineer would serve as consulting engineer to all boards and commissions. *Burrell v. City of Portland*, 61 Or 105, 113, 121 P 1 (1912). In reaching this conclusion, the court stated:

Whenever a power is given by statute, everything necessary to make it effectual is implied. It is a well-established principle that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant. The grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted.

*Id.* at 111 (citing LEWIS SUTHERLAND, STATUTORY CONSTRUCTION, § 508). By necessity, in concluding that the city had implied authority to contract for the services of a consulting engineer, the court was also concluding that the city had implied authority to expend the funds necessary to pay for the engineer’s services. Nothing in *Burrell* indicates that the court considers the question of implied authority differently when that authority is to expend public funds.

With regard to Measure 7, the principle of implied authority means that an agency with expressly conferred authority to promulgate or enforce regulations also has the implied authority to pay the costs incurred in taking those actions. Because payment of Measure 7 claims is a necessary cost of continuing to apply and enforce agency regulations that restrict the use of private real property, we conclude that the authority to pay Measure 7 claims is an implied power of every agency with express authority to promulgate or enforce regulations that restrict the use of private real property, unless existing statutes contradict the existence of such implied authority.

## 2. Appropriations

Agencies with authority to pay Measure 7 claims may only exercise that authority, however, if they have moneys available within their appropriations that may be used for that purpose.<sup>xxxiv/</sup> The requirement in ORS 293.295(2) for an appropriation from which a claim may be paid is consistent with the constitutional prohibition against drawing funds from the State Treasury without an appropriation. *See* Or Const, Art IX, § 4 (“No money shall be drawn from the treasury, but in pursuance of appropriations made by law”). The Oregon Supreme Court has explained that the object of the requirement in Article IX, section 4 for an appropriation “is to secure to the legislative department the sole and exclusive power of determining how, when, and for what purpose the public fund[s] shall be applied, and its will upon that question is mandatory on all the other departments of the government.” *Boyd v. Dunbar*, 44 Or 380, 384, 75 P 695 (1904).

Measure 7 does not appropriate funds for the payment of claims. Therefore, the power to appropriate the state’s money for the payment of Measure 7 claims is vested exclusively with the legislature pursuant to Article IX, section 4. This means that a state agency authorized to pay claims may not do so unless the legislature has appropriated funds that the agency may use for that purpose.

The appropriation requirement is related to another constitutional provision, Article XI, section 7, which generally prohibits the legislature from creating debts or liabilities that exceed \$50,000.<sup>xxxv/</sup> One way that the legislature ensures its adherence to the Article XI, section 7, debt limitation is through its exercise of the appropriations power. In other words, the legislature’s appropriation of money to state agencies establishes the balance between available state funds and expenditures. Therefore, if an agency spends moneys other than those appropriated to it, the agency would not only violate the appropriations requirement in Article IX, section 4, of the Oregon Constitution, but it may also incur debts or liabilities in violation of Article XI, section 7. (The significance of the constitutional debt limit is discussed further in Part VI A of this opinion.)

This office has previously considered the situation where the legislature mandated by statute that a state agency perform certain duties, but did not appropriate funds specifically for that purpose. We concluded that the agency must spend funds in its budget to implement the statutory mandate “unless to do so would violate some clear and explicit prohibition in the appropriation.” 38 Op Atty Gen 1908, 1912 (1978). *See also* 49 Op Atty Gen \_\_ (No. 8271 Feb. 23, 2000) (slip op at 4 n 6) (advising Oregon Department of Transportation that it must implement newly enacted legislation with any funds that are not constitutionally, statutorily or otherwise dedicated to some other purpose). Likewise, with respect to Measure 7 claims, an agency may pay claims resulting from regulations it is authorized to adopt or enforce with any funds appropriated to the agency unless doing so would violate an explicit prohibition in the appropriation. The mere fact that the agency had planned to use its appropriated funds to pay other agency expenses, including expenses arising from other legislatively mandated activities, is not sufficient grounds to consider the funds unavailable for Measure 7 claims.

In conjunction with the constitutional and statutory appropriation requirements, there is also a statutory system of allotments. Under ORS 291.234 to 291.260, the legislature has authorized DAS to “allocate” for expenditure within a calendar quarter, or such other period prescribed by DAS, a portion of an agency’s appropriations for the biennium. ORS 291.250 prohibits an agency with appropriations subject to the allotment system from creating

any claim or encumbrance for the future disbursement of appropriated moneys unless the proposed expenditure as estimated, together with expenses theretofore paid from or encumbered against such allotment, is within the total amount and for the purposes specified in the notice of allotment transmitted to such agency.

Consequently, if the appropriations available to an agency are subject to the statutory allotment system,<sup>xxxvi/</sup> the agency must limit its payment of claims according not only to the amount of the appropriation available for the biennium but also to the amount of the allotment available for the allotment period in which the claim will be paid.<sup>xxxvii/</sup> This is true for an agency’s payment of all claims, including Measure 7 claims.<sup>xxxviii/</sup>

In sum, we conclude that an agency with authority to promulgate or enforce a regulation that provides the basis of a Measure 7 claim has authority to pay that claim, even if it does not receive an appropriation specifically for that purpose, so long as the agency has funds available to it that may be spent to pay such claims without violating “some clear and explicit prohibition in the appropriation” and the funds needed for payment are available within the agency’s allotment for the applicable quarter.

## **B. Availability of Funds Appropriated for Tort Claims or Condemnation**

Two sets of statutes, those related to governmental torts and condemnation, provide distinct sources of funding for the payment of claims. We examine both of these to determine if they provide funds with which an agency could pay a Measure 7 claim.

### **1. Oregon Tort Claims Act**

Every “public body” in Oregon is liable for its torts and those of its officers, employees and agents, consistent with the provisions of the Oregon Tort Claims Act (OTCA).<sup>xxxix/</sup> ORS 30.265(1). Under the OTCA, a “tort” is “the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy.” ORS 30.260(8). The legislature has established the state’s insurance fund from which tort claims adjudicated under the OTCA are paid. ORS 278.425.

Before enactment of the OTCA, Oregon courts distinguished claims for compensation due to inverse condemnation under Article I, section 18, from tort claims.<sup>xl/</sup> *Tomasek v. Oregon Highway Comm’n*, 196 Or 120, 146, 248 P2d 703 (1952) (quoting *Great Northern Ry. Co. v. State*, 173 P 40, 42 (Wash 1918) (“When taking private property for a public use, the state acts in its sovereign capacity\* \* \* \* If the state or its agent \* \* \* takes no more than is necessary, and prosecutes its work without negligence, it is neither a trespasser nor a tort-feasor.”)). Cases

decided after the enactment of the OTCA adhere to this distinction. *See, e.g., Vokoun v. City of Lake Oswego*, 169 Or App 31, 37, 7 P3d 608 (2000) (“Only interference with property rights that is a natural and ordinary consequence of a lawful government action may form the basis of an inverse condemnation claim”); *Sells v. Nickerson*, 76 Or App 686, 691 n4, 711 P2d 171 (1985), *rev den* 300 Or 722, 717 P2d 630 (1986) (citing *Suess Builders*, 294 Or 254, 656 P2d 306 (1982) (ORS 30.275 governing notice of tort claims does not apply to inverse condemnation actions)).

To date, the courts’ examination of whether an inverse condemnation claim is a tort claim has focused on the non-negligent nature of the government’s actions leading to a “taking” of property under Article I, section 18, rather than the failure of the government to pay just compensation for that taking. For the same reasons expressed by the courts in relation to pre-Measure 7 inverse condemnation cases, we conclude that an agency’s enforcement of a regulation entitling a property owner to compensation under Measure 7 does not give rise to a tort claim. So long as the agency acts under constitutional or statutory authority, applying or enforcing a regulation constitutes neither negligence nor breach of a legal duty.

A separate question of whether a tort claim may be brought in relation to a Measure 7 claim arises from the state agency’s constitutional duty to pay compensation when enforcing a regulation that restricts the use of private property. Would the failure of an agency to pay compensation, if it continues to enforce the regulation 90 days after the property owner has filed a Measure 7 claim, give rise to a separate claim under the OTCA? For the following reasons, we conclude that it would not.

Under the definition of “tort” in the OTCA, an act is tortious only if the injury is one “for which the law provides a civil right of action for damages or for a protective remedy.” ORS 30.260(8). In determining that a city police department’s breach of a statutory duty to take an intoxicated person into custody gave rise to a claim under the OTCA, the Oregon Supreme Court had to determine whether the law provided a civil right of action when the statute giving rise to the duty did not explicitly do so. *Scovill By and Through Hubbard v. City of Astoria*, 324 Or 159, 921 P2d 1312 (1996). In making its decision, the court quoted the following passage from the RESTATEMENT (SECOND) OF TORTS, § 874A (1979):

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

324 Or at 171. The court noted that “recognition of a statutory tort is governed by the weight that a court finds reasonable to give to the protective purpose spelled out in the legislation.” *Id.* Using that measure, the court held that the police department’s failure to act gave rise to a statutory tort because permitting a tort action “is consistent with and serves to enforce the legislated duty imposed by [the statute], which does not specify other means for its enforcement.” *Id.* at 172.

Measure 7 imposes a constitutional duty on the state to pay compensation to property owners under specified circumstances. Because Measure 7 is self-executing,<sup>xlii/</sup> a property owner may enforce the state's legal duty to pay compensation by bringing suit in state court if the state fails to provide an administrative process for the processing and payment of claims. In addition, Measure 7 addresses the possibility of the state's denying, or delaying, payment of claims. The Measure does so by defining "just compensation" to include "reasonable attorney fees and expenses necessary to collect the compensation" when the state either denies a claim or does not fully pay it within 90 days of its filing. Measure 7, subsection (e). Thus, Measure 7 provides property owners with the means to enforce Measure 7, but does not provide a separate civil right of action for a property owner to pursue damages resulting from the state's failure to pay.

Neither the text of Measure 7 nor the Voters' Pamphlet offers any indication that the voters intended to provide property owners with a tort claim as a means to redress a state agency's failure to execute the legal duty of paying just compensation. Indeed, unlike the situation in *Scovill*, it is difficult to conceive how permitting a tort action under Measure 7 would serve to enforce the duty to pay compensation that the Oregon Constitution imposes on the state. We conclude that Measure 7 does not give rise to a tort claim against the state for failure to pay compensation. Therefore, the state's insurance fund is not available to pay Measure 7 claims.

## 2. Condemnation Statutes

Eminent domain is a state's inherent power to take any property within its jurisdiction for a public use or benefit. *GTE Northwest, Inc. v. Public Utility Comm'n of Oregon*, 321 Or 458, 466, 900 P2d 495 (1995), *cert den* 517 US 1155, 116 S Ct 1541, 134 L Ed2d 646 (1996). The right of eminent domain can be exercised only by legislative authority. *Id.* Those agencies to which the legislature has delegated the power of eminent domain exercise that power through the process of condemnation, as provided in ORS chapters 35 and 281.<sup>xlii/</sup>

ORS chapter 281 addresses the payment of just compensation to property owners resulting from the state's condemnation actions. ORS 281.220 directs the Attorney General to bring suit to condemn a portion of, or interest in, property when the state and the property owner cannot agree on just compensation and the relevant state agency requests the Attorney General to act.<sup>xliii/</sup> ORS 281.250 provides:

The expenses of the condemnation proceeding, the value of the property, and the damages for the taking thereof, shall be paid out of funds provided for the department or institution for which the property is acquired in the same manner as other expenses for like purposes of such department or institution are paid. If no funds have been provided out of which the same can be paid, payment shall be made out of any funds in the treasury not otherwise appropriated, and the Oregon Department of Administrative Services is authorized to draw a warrant on the treasurer therefor.

ORS 281.260 provides that the statutes preceding it in the chapter "do not require the state to make or tender compensation prior to condemning and taking possession of the lands or

property.” This provision is consistent with Article I, section 18, of the Oregon Constitution which requires all parties, other than the state, to assess and tender just compensation before condemning property.

When read together, it becomes clear that ORS 281.210 to 281.260 apply only when the state seeks to acquire private property for public use. Nothing in the statutes shows an intent on the part of the legislature to apply the payment provisions of ORS 281.250 to inverse condemnation, let alone where the state acts separately from its eminent domain power by regulating the use of private property. Because the statutory scheme does not apply to the regulatory actions referenced by Measure 7, ORS 281.250 does not provide a source of payment for Measure 7 claims.

## **VI. State Agencies’ Foregoing Enforcement of Regulations**

Under subsection (d) of Measure 7, compensation is due to a property owner on a valid claim<sup>xlii/</sup> if the regulation restricting the use of the owner’s property “continues to apply to the property 90 days after the owner applies for compensation.” This raises two questions: whether a state agency whose regulation is the subject of a valid Measure 7 claim may forego enforcement of the regulation in order to avoid liability for that claim and, if so, whether there are any constraints on that decision.

### **A. Authority to Forego Enforcement**

Because Measure 7 provides that compensation is due only where the regulation "continues to apply" 90 days after the claim is made, it may be suggested that Measure 7 itself authorizes state agencies to forego enforcement of regulations.<sup>xlii/</sup> However, Measure 7 itself provides no express powers to state agencies and does not authorize agencies to forego enforcement of regulations restricting the use of private real property. Consequently, we must look to existing law to determine whether the agency has the discretion to choose whether or not to enforce the regulation. We first consider agency rules, then the statutes and finally constitutional provisions.

#### **1. Agency Rules**

Analytically, the agency rules are the first place to look to determine whether an agency has discretion whether or not to enforce a regulation. Once an agency has promulgated rules, the agency is bound by those rules. *Harsh Inv. Corp. v. State by and through State Housing Div*, 88 Or App 151, 157, 744 P2d 588 (1987) (citing *Bronson v. Moonen*, 270 Or 469, 476-77, 528 P2d 82 (1974)). Thus, even if an agency is vested with discretion by statute, the agency may have limited its own discretion in its rules. *Peek v. Thompson*, 160 Or App 260, 265, 980 P2d 178 (1999) (citing *Wyers v. Dressler*, 42 Or App 799, 807-8, 601 P2d 1268 (1979), *rev den* 288 Or 527 (1980), *overruled on other grounds Mendieta v. Division of State Lands*, 148 Or App 586, 941 P2d 582 (1997)). In that case, instead of determining if the agency’s enabling statutes require enforcement, a court would determine what the agency’s rules require. *Id.*



An agency may forego enforcement of its own rules only if the rules give the agency that discretion or the agency is required to forego enforcement by other statutes or the constitution, as discussed below. Of course, an agency may take rulemaking action under ORS 183.310 to 183.505 to amend, suspend or repeal one or more of its rules to remove any limitations on its discretion to not enforce its rules, unless constrained by statute or the constitution.

## **2. Statutes**

In considering statutes that may constrain an agency's discretion, we first discuss agency enabling statutes, i.e., the statutes that create an agency and give the agency its powers and responsibilities. These statutes will determine whether an agency has discretion to forego enforcement of a regulation. Then, we discuss the agency's appropriation and the allotment statutes. These statutes may require an agency to forego enforcement of a regulation.

### **a. Agency Enabling Statutes**

In Part V of this opinion, we explained that a state agency has only those express and implied powers conferred upon it by statute. *Ochoco Const., Inc.*, 295 Or at 426. Thus, if an agency's enabling statutes require it to act, the agency must do so; the agency would not have authority to do otherwise.

Because an analysis of specific agency statutes is beyond the scope of this opinion, we consider three broad categories of statutes that regulate the use of private real property: (1) statutes that authorize, but do not require the agency to regulate, (2) statutes that require the agency to regulate, but give the agency discretion in determining how to do so, and (3) statutes that both require the agency to regulate and direct how the agency must do so.

In the first category – statutes that authorize, but do not require the agency to regulate – the agency has full discretion to act or not to act. Because the statutes give the agency discretion to act, the agency may choose whether or not to forego enforcement of a regulation restricting the use of private real property unless the agency's own rules limit its discretion, as discussed above, or the agency is required to forego enforcement by other statutes or the constitution, as discussed below.

In the second category – statutes that require the agency to regulate, but that give the agency discretion in how to do so – it is more difficult to determine the extent to which an agency has discretion not to enforce a particular regulation. Assuming that the agency's enabling statutes give it discretion to forego enforcement of a regulation, the agency's decision may nevertheless be constrained by the agency's own rules, as discussed above, or the agency may be required to forego enforcement by other statutes or the constitution, as discussed below.

In the third category – statutes that both require the agency to regulate and direct how the agency must do so – the agency has no discretion. In this situation, the agency has no authority to forego enforcement of the regulation unless some other statute or the constitution requires it to do so.

## **b. Appropriation and Allotment Statutes**

An agency's appropriation and its allotments may require the agency to forego enforcement of a regulation restricting the use of private real property. This is because the appropriations and allotments limit not only an agency's authority to *pay* claims, as discussed in Part V of this opinion, but also an agency's authority to *incur* a financial obligation.

Based on the wording of subsection (d) of Measure 7 that compensation "shall be due \* \* \* if the regulation \* \* \* continues to apply to the property 90 days after the owner applies for compensation," we conclude that an agency incurs an obligation to pay a valid Measure 7 claim on the 90<sup>th</sup> day after the property owner files the claim if the regulation continues to apply to the property on that date. We discuss the effect of both the agency's appropriation and its allotments on the agency's authority to determine whether to continue to enforce a regulation on or after the 90<sup>th</sup> day.

### **(1) Appropriation**

If an agency is faced with valid Measure 7 claims that exceed its available appropriation, and the agency does not have discretion under its enabling statutes and rules to forego enforcement of a regulation restricting the use of private real property, the agency would need to request additional funds from the legislative Emergency Board pursuant to ORS 291.322 to 291.328. *See* 49 Op Atty Gen \_\_ (No. 8271, Feb. 23, 2000) (slip op at 4 n 6) (advising Oregon Department of Transportation that it must seek funding from Emergency Board to implement newly enacted legislation). If the Emergency Board declines to make the needed funds available to the agency, the agency would be required to operate within its available appropriation.

By itself, the Emergency Board's denial of a request for additional funds does not vitiate the agency's obligation to continue to enforce a statutorily mandated regulation restricting the use of private real property. The agency may be able to discontinue or cut back on other, optional agency activities in order to have appropriated funds available for the payment of Measure 7 claims resulting from a mandatory regulation. *See* 38 Op Atty Gen 1909 (1978) (agency must carry out newly imposed but unfunded mandatory duties even if doing so would take money from other areas and deplete service).

In 34 Op Atty Gen 1114 (1970), we were asked whether the State Labor-Management Relations Board was required to perform its statutory functions in view of the action of the legislature in not appropriating any funds for the board. We stated:

Even though the legislature has not seen fit to repeal the board's statutory duties, its action in not funding the board must be viewed as a direct expression of legislative will, more explicit than any rule of statutory construction that the board not perform its duties during the current biennium. Similar action by the Emergency Board appears to us to negate any possibility of legislative oversight.

*Id.* at 1115. Measure 7 presents a somewhat different situation as the legislature has not declined to provide *any* funds to an agency. Rather an agency's existing appropriation is likely to be

insufficient to cover all of the agency’s mandatory activities because the cost of the activities has risen considerably as a result of action that occurred after the legislature approved the agency’s budget. Thus, there is no “direct expression of legislative will” that an agency not undertake any particular activities otherwise required by its enabling statutes. The agency must continue to perform all of its mandatory duties as long as it has funds available in its appropriation to do so. 38 Op Atty Gen at 1912. If the agency runs out of money before the end of the biennium and the Emergency Board does not appropriate additional funds, the agency at that point would no longer be required to perform its mandatory statutory duties, only one of which may be enforcement of regulations restricting the use of private real property.

## (2) Allotments

Of a more immediate concern to an agency faced with valid Measure 7 claims is the allotment system, ORS 291.232 to 291.260, which authorizes DAS to allocate for expenditure within a calendar quarter (or other allotment period) a portion of an agency’s biennial appropriation. ORS 291.242(1) requires each agency to submit to DAS an estimate for the next allotment period of the amount required for each activity to be carried out during that period.

Because a valid Measure 7 claim is due 90 days after it is filed, an agency would generally incur the obligation to pay that claim in the quarter following the quarter in which the claim is filed.<sup>xlvi/</sup> Therefore, unless an agency has discretion under enabling statutes to not enforce the regulation giving rise to the Measure 7 claim, the agency would be required to take a valid Measure 7 claim into account when the agency submits to DAS its estimate for the upcoming quarter.<sup>xlvii/</sup>

ORS 291.244 provides the following standards for DAS when making allotments in response to an agency’s estimate:

If the estimate is within the terms of the appropriation as to amount and purposes, having due regard for the probable further needs of the agency for the remainder of the term for which the appropriation was made, and if the department determines that there is a need for the estimated amount for the allotment period, the department shall approve the estimate and allot the estimated amount for expenditures. Otherwise the department shall modify the estimate so as to conform to the terms of the appropriation and the prospective needs of the agency, and shall reduce the amount allotted accordingly.

Under this statute, DAS must allot the estimated funds to an agency if the estimated expenditures are: (1) within the total amount of the agency’s appropriation, (2) within the purposes of the appropriation, and (3) actually needed for the allotment period. In making these determinations, DAS is required to have “due regard for the probable future needs of the agency for the remainder of the term for which the appropriation was made.” If the estimate does not meet these tests, DAS must modify the estimate to conform to the appropriation and the prospective needs of the agency. *Id.*

We previously considered DAS's authority under this statute in a 1961 opinion.<sup>xlviii/ 30</sup> Op Atty Gen 284 (1961). We were asked whether, in light of the additional expenditures necessitated by statutory duties imposed on the State Tax Commission by the legislature after the agency's appropriation became effective, DAS could authorize allotments in amounts that contemplated the eventual approval by the Emergency Board of additional funds for the agency. Although the Tax Commission stated that the addition of the new duties would "severely limit both the old and new programs to the detriment of each," we concluded that DAS

cannot deliberately make an allotment which, after [DAS] has estimated to the best of its ability the needs of the agency for the remainder of the biennium, it has reasonable cause to believe will produce a deficit.

*Id.* at 286. We concluded that any other interpretation of the allotment statutes would violate the legislative policy in ORS 291.232, which states that

the total appropriation made by [the legislature] \* \* \* for any state agency, shall be deemed to be the maximum amount necessary to meet the requirements of such agency for the biennium \* \* \* and \* \* \* the Governor and [DAS] are given the powers granted by ORS 291.202 to 291.260 in order that savings may be effected by careful supervision throughout each biennium \* \* \* .

*Id.* There is no indication in the 1961 opinion that the Tax Commission would have been unable to perform its statutorily mandated duties, albeit that both its old and new programs would need to be curtailed.

A valid Measure 7 claim presents a somewhat different situation if the agency has no discretion under its enabling statutes to forego enforcement of the regulation giving rise to the Measure 7 claim. In this situation, the agency cannot curtail its enforcement of the regulation in order to avoid the Measure 7 claim becoming due in the next allotment quarter. Consequently, we believe that the agency must include an amount for such a claim in its allotment estimate and that, pursuant to ORS 291.244, DAS must approve an allotment sufficient to pay that claim as long as the agency has appropriated funds available to pay the claim and to carry out the agency's mandatory duties for the remainder of the biennium. Because DAS must have "due regard for the probable future needs" of the agency for the remainder of the biennium, we believe that it would be incumbent upon the agency and DAS together to assess to the best of their abilities how the agency's remaining appropriation should be allocated for the remainder of the biennium in order to avoid a deficit. *Id.* Given the substantial liabilities that an agency may face from valid Measure 7 claims, the agency and DAS may need to confer about nonmandatory activities that the agency can curtail or eliminate in order to ensure that there will be sufficient funds to carry out the agency's mandatory activities, including the continued enforcement of any regulations restricting the use of private real property that the agency's enabling statutes do not give the agency discretion to not enforce.

Despite the best efforts of DAS and the agency to adjust the agency's allotments and expenditures, it is possible that, before the end of the biennium, an agency's continued enforcement of a regulation restricting the use of private real property would result in a valid

Measure 7 claim that would make it impossible for the agency to continue to perform all of its mandatory activities. In that event, DAS could not approve an allotment sufficient to pay the claim without producing a deficit, which DAS may not do.

At this point, ORS 291.238 would come into play. ORS 291.238 provides that:

[N]o person shall incur \* \* \* any obligation against the state in excess of, or make \* \* \* any expenditure not authorized by, an allotment. Any such obligation so incurred shall not be binding against the state, but where the obligation violates this section only for having been made in excess of an allotment, the Oregon Department of Administrative Services may authorize payment thereof from unallotted funds.

If DAS does not approve an allotment for the upcoming quarter sufficient to pay a valid Measure 7 claim,<sup>xlix/</sup> the agency could not incur any obligation or make any payment on such a claim that would cause the agency to exceed its allotment without violating ORS 291.238, which the agency may not do.<sup>l/</sup> Thus, the agency would need to determine which of its conflicting statutory mandates is controlling – the mandate to enforce the regulation restricting the use of private real property or the mandates to perform whatever other activities necessitate expenditures from the agency’s appropriation.<sup>li/</sup> Because this determination can only be made by reviewing the particular agency enabling statutes, it would need to be made on a case-by-case basis and is beyond the scope of this opinion. Any resolution of that issue will necessarily thwart one or more legislative policies.

### 3. Oregon Constitution – Debt Limit

Like the appropriation and allotment statutes, the debt limit in Article XI, section 7, of the Oregon Constitution may also require an agency to forego enforcement of a regulation restricting the use of private real property.

Article XI, section 7, of the Oregon Constitution provides in relevant part:

The Legislative Assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars \* \* \* .

While the debt limit is directed to the legislature, “the courts have treated [Article XI, section 7] as applying equally to the actions of members of the Executive Branch acting pursuant to statutory authorization.” Letter of Advice dated September 12, 1984, to Robert L. Montgomery, Administrator, Intergovernmental Relations Division at 4 (OP 5725), citing *McClain v. Regents of the University*, 124 Or 629, 633-35, 265 P 412 (1928). In determining whether a state agency’s actions may violate the debt limitation, the critical question is “whether a given commitment \* \* \* creates a possibility that the taxpayers may be called on to satisfy an obligation [for which] the state does not currently have cash on hand \* \* \* sufficient in itself to pay the obligation.”<sup>liii/</sup> OP 5725 at 4-5.

An agency does not necessarily create a “debt” in violation of Article XI, section 7 if the agency incurs an obligation to pay a claim that exceeds its biennial appropriation. A “debt” in violation of Article XI, section 7 is created only if the obligation exceeds all unappropriated and not otherwise obligated funds in the treasury.<sup>liii/</sup> *State ex rel Kane v. Goldschmidt*, 308 Or 573, 583, 783 P2d 988 (1989). However, the legislative practice of appropriating all available moneys means that, by incurring financial obligations that exceed its own appropriations, an agency runs a substantial risk of violating Article XI, section 7.

In the context of Measure 7, the constitutional debt limit means that, even if an agency did not attempt to *pay* a claim for which it did not have sufficient appropriations, thereby avoiding a violation of Article IX, section 4, the agency could violate the constitution simply by *incurring* the obligation to pay the claim if the claim, when aggregated with other debts and liabilities of the state that exceed all unappropriated and not otherwise obligated funds in the treasury, are in excess of \$50,000. Therefore, even if an agency’s enabling statutes do not give the agency discretion to forego enforcement of a regulation restricting the use of private real property, the agency may not continue to enforce the regulation against property as to which a claim has been filed on or after the 90<sup>th</sup> day after filing if doing so would cause the state to violate the debt limit.<sup>liv/</sup> This is because the constitutional requirements imposed on a state agency are superior to statutory mandates. Stated differently, the legislature may not require an agency to act unconstitutionally. Letter of Advice dated March 26, 1985, to Representative D.E. Jones at 4 (OP 5825). Concluding that an agency may no longer enforce a mandatory regulation, however, does not completely resolve debt limit concerns.

Under Measure 7, subsection (d), compensation is due if the regulation “continues to *apply* to the property 90 days after the owner applies for compensation.” (Emphasis added.) While an agency may stop *enforcing* a regulation where it has discretion to do so, the regulation may continue to *apply* to the property as long as the regulation has not been repealed. (In Part III E of this opinion, we explain how a regulation may “continue[ ] to apply” even if not enforced by a state agency.) In OP 5825, we concluded that, if a statute cannot be construed in a manner consistent with the constitutional debt limitation, to the extent of the inconsistency, the statute would cease to have legal force or effect. OP 5825 at 4 (analyzing statute authorizing state agency to acquire and maintain heating and power system for public buildings and grounds). Applying this conclusion to mandatory regulations where the agency has no discretion whether to regulate, at the point that the obligation to pay a valid Measure 7 claim would result in a debt limit violation, not only may the agency no longer enforce the regulation against that property, but the regulation no longer applies to the property. In other words, the regulation no longer has any legal effect, at least in relation to the property that is the subject of the claim at issue.<sup>lv/</sup> At the point that a statute or rule would cause the state to incur a debt in excess of the debt limit, the statute or rule would exceed the authority of the legislature or agency under Article XI, section 7, and be legally ineffective.

The practical difficulty in advising an agency to act so as not to incur an obligation in violation of the debt limitation is being able to assess when a violation will occur. The agency could know that incurring an obligation to pay a specific Measure 7 claim would violate the debt limitation only if, at the time that obligation was incurred, there was available to the agency an accurate accounting of the state’s available funds and existing obligations. Given the number of

agencies that may receive Measure 7 claims and the potential value of those claims, it will be impossible for an individual agency to ascertain with certainty whether continuing to enforce a regulation on or after the 90<sup>th</sup> day after a claim has been filed will result in a debt limit violation. It is certain, however, that a significant risk of a debt limitation violation exists when a valid Measure 7 claim exceeds the appropriations available to the agency to pay that claim, and the Emergency Board fails to provide additional funds to the agency.<sup>lvi/</sup>

To summarize our analysis of appropriations, allotments and the debt limitation, we conclude that if an agency's enabling statutes or rules do not give the agency discretion to forego enforcement of a regulation restricting the use of private real property, an agency must enforce that regulation as long as it has money within its appropriation and allotments to pay valid Measure 7 claims. An agency must include in its allotment estimate an amount for valid Measure 7 claims that will be due in the upcoming allotment period and DAS must approve an allotment sufficient to pay such claims as long as the agency has appropriated funds available to pay the claims and to carry out the agency's mandatory duties for the remainder of the biennium, even if doing so will require the agency to discontinue or cut back on other statutory, but nonmandatory, activities. If, before the end of the biennium, the agency no longer has sufficient funds to perform all of its mandatory activities, the agency must determine which of its conflicting statutory mandates are primary. In no event, however, may the agency incur obligations in excess of its appropriation or allotment; at that point, the agency would no longer be required to perform its mandatory statutory duties. If the obligation to pay a Measure 7 claim would result in a debt limit violation, not only may the agency no longer enforce the regulation giving rise to the claim, but the regulation would no longer apply; it would cease to have legal force or effect.

## **B. Constraints on a Decision to Forego Enforcement**

To the extent that an agency has discretion under its rules or enabling statutes to forego enforcement of a regulation restricting the use of private real property to avoid liability for Measure 7 claims, the agency must be cognizant of the constitutional restrictions on its actions. Specifically, Article I, section 20, of the Oregon Constitution requires that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Article I, section 20 protects persons from arbitrary or capricious state action, not only with respect to the enactment of statutes but also in relation to the enforcement of the laws. See *State v. Clark*, 291 Or 231, 239, 630 P2d 810, cert den 454 US 1084, 102 S Ct 640, 70 L Ed2d 619 (1981) ("the guarantee reaches forbidden inequality in the administration of laws under delegated authority as well as in legislative enactments"). Any agency decision to forego enforcement of regulations rather than pay Measure 7 claims must be undertaken in a manner that does not leave the agency open to charges of arbitrary or capricious action.

Rulemaking is one tool that administrative agencies may use to avoid the kind of *ad hoc* decision making that the Oregon Supreme Court has found may give rise to claims under Article I, section 20. *Trebesch v. Employment Div.*, 300 Or 264, 267 n 3, 710 P2d 136 (1985). In *State v. Freeland*, 295 Or 367, 667 P2d 509 (1983), the court held that a prosecutor's ad hoc exercise

of discretion to charge a defendant by use of a grand jury indictment rather than an information violated Article I, section 20. The court explained its analysis as follows:

An individual challenging purely *ad hoc*, unsystematic use or denial of one or the other procedure need not show that he has been discriminated against on grounds that would be invalid if they were the basis of a systematic policy.

The question, then, is whether a prosecutor's use of the two charging procedures adheres to sufficiently consistent standards to represent a coherent, systematic policy, even when not promulgated in the form of rules or guidelines.

295 Or at 374-75 (footnote omitted). With respect to a prosecutor's choice of charging procedures, the court stated that "Article I, section 20, requires only that the choice be made by permissible criteria and consistently applied, so as to afford preliminary hearings to similarly situated defendants 'upon the same terms.'" *Id.* at 377. The *Freeland* court's requirement that a prosecutor act pursuant to a coherent and systematic policy speaks to how state agencies must administer their responsibilities. In deciding whether to forego enforcement of a regulatory scheme affected by Measure 7, an agency must employ "sufficiently consistent standards" so as to operate under "a coherent, systematic policy."<sup>lviii</sup> Additionally, the standards must themselves be constitutional. For example, deciding to pay compensation and to continue regulatory enforcement for all women and to forego enforcement of regulations against all men would create a standard based on characteristics that itself would raise concerns under Article I, section 20.

## **VII. Nuisance Laws Exception**

Subsection (b) of Measure 7 provides:

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

This portion of Measure 7 effectively excepts a particular set of government actions – the adoption or enforcement of historically and commonly recognized nuisance laws – from the otherwise applicable requirements of Measure 7 to pay compensation. Subsection (b) does so by providing that these particular laws "shall not be deemed to have caused a reduction in the value of a property." Accordingly, no claim for compensation may be based on the adoption or enforcement of such laws.

### **A. Historically and Commonly Recognized Nuisance Laws**

The text and context of subsection (b) of Measure 7 provide several indications of what set of laws the voters intended to exempt as "historically and commonly recognized nuisance laws." At the outset, we note that the common law is part of the context of Article I, section 18,



which must be taken into account in interpreting Measure 7. Specifically, common law nuisance forms a category of “background principles,” which as discussed in Part II of this opinion, are excluded from the rights inherent in a property owner’s title. See *City of Portland v. Cook*, 48 Or 550, 554-55, 87 P 772 (1906). An elemental principle of Oregon's property law is that private landowners do not have a right to produce or maintain a public nuisance on their property. See, e.g., *Smejkal v. Empire Lite-Rock, Inc.*, 274 Or 571. The Oregon courts have long recognized that a number of different activities constitute a nuisance, and that the right to engage in a public nuisance is not part of the property owner's title. *Id.* Because an owner's property right does not include the right to use the property in a manner that constitutes a public nuisance, the exception in subsection (b) of Measure 7 for “historically and commonly recognized nuisance laws” must refer to something other than common law public nuisance.

The text of Measure 7 also indicates that the voters intended to exempt more than common law nuisance. The voters excepted from the right to compensation, the “adoption or enforcement” of certain “nuisance laws.” The voters’ use of the plural “nuisance laws” is revealing. If the voters had intended to exempt only the abatement of common law nuisance, they would have used the singular “law.” Similarly, the fact that the voters also exempted the “adoption” of laws demonstrates that this set of laws includes more than the enforcement of existing rights to abate a common law nuisance, but rather includes laws that are enacted after the effective date of the Measure. As a result, we believe that the exception for “nuisance laws” in subsection (b) of Measure 7 applies to a set of “laws” that goes beyond common law public nuisance law.

The relevant dictionary definitions for “law” are:

**1 a (1) :** a binding custom or practice of a community : a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a sanction (as an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial decision, or usage) made, recognized, or enforced by the controlling authority \* \* \* **5 a :** the whole body of laws relating to one subject or emanating from one source usu. including the writings on them and the judicial proceedings under them \* \* \*.

WEBSTER'S at 1279. Thus, the ordinary meaning of “laws” is conduct or action that is prescribed or recognized as binding by controlling authority, such as orders, ordinances, statutes, resolutions, rules and judicial decisions.

In subsection (e) of Measure 7, the voters defined a “regulation” as including any enforceable law, rule, ordinance, resolution or goal. By distinguishing “law” from other types of enforceable enactments, it is possible that the voters intended also to limit the meaning of the term “laws” as it is used in subsection (b). Such a limited meaning would include only state statutes – leaving state agency rules and orders, local ordinances and resolutions, and judicial decisions outside of the exception. On close examination, however, it is apparent that the list of government actions included within the definition of the term “regulation” in subsection (e) of Measure 7 is intended to be illustrative, rather than a set of mutually exclusive items. There is substantial overlap, for instance, between “enforceable” goals and laws and rules. Indeed, to be

enforceable as to a private person, legislative or administrative goals normally must be adopted by statute or rule. *McCleery v. State By and Through Oregon Bd. of Chiropractic Examiners*, 132 Or App 14, 887 P2d 390 (1994). As an example, the Statewide Land Use Planning Goals are adopted as rules. Similarly, unless there is a specific statutory or charter requirement, whether a city or county acts by ordinance or resolution is immaterial. *Fifth Ave. Corp. v. Washington County*, 282 Or at 598; *see generally* MCQUILLIN MUN. CORP. § 15.02 (3<sup>rd</sup> ed). Thus, although the term “laws” could have been intended to mean only state statutes, we believe it more likely that the voters intended the term to have its ordinary meaning in subsection (b).

The term “nuisance” is defined as:

**1** : HARM, INJURY \* \* \* **2** *law* : an offensive, annoying, unpleasant, or obnoxious thing or practice : a cause or source of annoyance that although often a single act is usu. a continuing or repeated invasion or disturbance of another's right \* \* \* .

WEBSTER'S at 1548. Thus, the ordinary meaning of “nuisance laws” is statutes, rules, ordinances, orders, resolutions, judicial decisions and other controlling authority that prevent or remedy harm or injury. We discuss in more detail below the kind of harm or injury that we believe is included, based on the legal meaning of the term “nuisance.”

Under subsection (b), only those nuisance laws that are “historically and commonly recognized” are excepted from Measure 7's compensation requirement. The ordinary meaning of the word “historically” is “in accordance with or in respect to history,” and the ordinary meaning of “history” is:

the events that form the subject matter of a history : a series of events clustering about some center of interest (as a nation, a department of culture, a natural epoch or evolution, a living being or a species) upon the character and significance of which these events cast light.

WEBSTER'S at 1073-74. For the word “historically” to accurately describe anything, it is necessary for the term to have a “qualifying adjective” or to refer to some “center of interest.” The center of interest here is “nuisance laws.” Measure 7 does not include a specific date after which a nuisance law cannot be considered “historically recognized.” And there is no principle that allows us to set a specific date. It is reasonable to expect, however, that the more recently a particular type of nuisance law has been adopted or enforced, the less likely it will be held to be “historically” recognized. As discussed below, there are nuisance laws that have a long history in Oregon.

The word “common” has a number of definitions. Those having a bearing on this provision of Measure 7 include:

**1 a** : of or relating to a community at large \* \* \* generally shared or participated in by individuals of a community \* \* \* **b** : known to the community;

[especially] : notorious as an accustomed general vexation [e.g.,] <a [common] thief>; <punished as a [common] scold>; <maintaining a [common] nuisance>  
\* \* \*

*Id.* at 458. Accordingly, we believe that “commonly recognized” likely means widely recognized throughout the state or some significant portion of the state. This will have a direct bearing primarily on local laws; local ordinances will have to be common throughout at least some relevant portion of the state in order to be “commonly recognized” for purposes of subsection (b).

The text of subsection (b) does not specify who must have “historically and commonly recognized” the laws as nuisance laws. As described below, however, there are substantial bodies of both judicial decisions recognizing certain laws as nuisance or harm-preventing laws, and long-standing state and local legislative declarations that particular types of uses of private real property are nuisances that may be restricted or prohibited or abated. Based on these decisions and laws, we believe that a particular law is a “nuisance law” for purposes of subsection (b) of the Measure if it governs a type of use that has been determined to be a nuisance by judicial decisions or by long-standing state or local legislative enactments. Where the enactment is a local one, in order for it to be “commonly recognized,” there must be a substantial number of similar local ordinances in other cities or counties in order for the law to come within subsection (b) of Measure 7.

Putting together these ordinary meanings, we believe that the clause “historically and commonly recognized” limits the class of nuisance laws that do not require compensation under Measure 7 to those laws that are of a type or class that has been widely recognized for some time and widely applied throughout the state as being for the purpose of preventing harm or injury.

We next consider the kind of harm or injury that “nuisance laws” address. Case law regarding “nuisances” provides part of the context of the term “nuisance laws” as used in Measure 7. The term “nuisance” is not clearly defined in the law generally. Indeed, in discussing the legal meaning of the term “nuisance,” the Oregon Supreme Court has quoted the following statement with approval:

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the court to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a 'nuisance,' and there is nothing more to be said \* \* \*.

***Raymond v. Southern Pac. Co.***, 259 Or 629, 633-34, 488 P2d 460 (1971) (footnotes omitted) (quoting PROSSER, TORTS 592, § 87 (3<sup>rd</sup> ed 1964)).

Although the precise outline of what constitutes a “nuisance” in any particular factual circumstance is not well-settled under the law, the law regarding the *types* of uses of private real property that may be restricted, prohibited or abated in order to avoid a harm or injury that constitutes a nuisance is relatively well developed in Oregon. From this body of judicial decisions and existing enactments, we can draw some conclusions that help define what the voters likely intended “nuisance laws” to include for purposes of Measure 7. We look first at general case law regarding public and private “nuisance,” then to judicial decisions and particular laws applying or describing particular types of enactments as nuisance laws, and finally to judicial decisions considering nuisance specifically under Article I, section 18, of the Oregon Constitution. We conclude that “nuisance laws” are those enactments adopted to prevent harm or injury to public rights, health, safety or morals.

Oregon courts accept the common definition of nuisance as something that is inherently harmful and that unreasonably and substantially interferes with ordinary use or enjoyment of property. *See, e.g., Amphitheaters, Inc. v. Portland Meadows*, 184 Or 336, 347, 198 P2d 847 (1948). There are two types of nuisance – public and private. Private nuisance law arose to protect private landowners from interference with the use or enjoyment of land. PROSSER AND KEETON, TORTS (PROSSER), ch 15 § 86 (5<sup>th</sup> ed 1984). Thus Oregon courts recognize a private nuisance as an unreasonable non-trespassory interference with another’s private use and enjoyment of land. *Mark v. Dept., of Fish and Wildlife*, 158 Or App 355, 360, 974 P2d 716, *rev den* 329 Or 479, 994 P2d 127 (1999).

A public nuisance is the invasion of a right common to all members of the public. *Id.* Public nuisance law originated in England as criminal prohibitions on “purprestures,” encroachments on the royal domain or public highway. PROSSER, at 617. This remedy against interference with public rights eventually grew to include other criminal offenses prohibiting interference with the rights of the community at large. *Id.* at 618. Thus, public nuisance encompasses more than interference with the use and enjoyment of property, but also includes interference with public health, safety and morals. *Id.* at 643-44. *See also* RESTATEMENT OF TORTS SECOND, § 821 B (“A public nuisance is an unreasonable interference with a right common to the general public.” Circumstances giving rise to a determination that an interference is unreasonable include conduct that involves “a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience \* \* \*.”)

In Oregon, as elsewhere, state and local governments have enacted criminal statutes codifying common law nuisance. *See* PROSSER at 646. Thus, in 1864, Oregon enacted a statute providing:

If no punishment is expressly prescribed for the act by the criminal statutes, any person who willfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, upon conviction shall be punished by imprisonment in the county jail \* \* \*.

This statute, which was last codified as ORS 161.310 and repealed in 1971, Or Laws 1971 ch. 743,<sup>lviii</sup> was relied on to prohibit a wide variety of conduct, including running an “abortion mill,” *State v. Atwood*, 54 Or 526, 104 P 195 (1909); operating a gambling house, *State v. Nease*, 46 Or 433, 80 P 897 (1905), and *State v. Ayers*, 49 Or 61, 88 P 653 (1907); engaging in lewd behavior, *State v. Franzone*, 243 Or 597, 415 P2d 16 (1966); obscene words and gestures, *Wilson v. Parent*, 228 Or 354, 365 P2d 72 (1961); and bookmaking, *City of Portland v. Duntley*, 185 Or 365, 203 P2d 640 (1949). Although the statute does not use the term “nuisance,” the Oregon Supreme Court explained the nuisance basis of this statute as follows:

It is true, the offenses referred to were technically denominated “nuisances” at common law, and that term does not occur in the statute; but the language used is essentially descriptive of the general character of such offenses, and quite equivalent thereto. Certain acts were punishable as nuisances at common law because they outraged public decency and were against good morals, such as habitual, open, and notorious lewdness, roaming the streets naked, the indecent exposure of the person on a highway or in a public place, the exhibition of an unseemly or obscene sign or picture, and other similar matters. Other acts were likewise punishable because they injuriously affected the public health, such as maintaining slaughterhouses in a populous neighborhood, or the exposing for sale for human food of putrid or infected articles which were injurious to the health, and the like.

Still other acts were punishable because they disturbed or injured the public peace or morals, by congregating large numbers of idle and dissolute persons in one place for vicious purposes, and of such were common gaming houses.

*State v. Nease*, 46 Or at 440-41 (citations omitted).

Thus, since at least 1864, Oregon law has recognized, as a criminal offense, conduct that injures public health, public peace and public morals, whether or not the statutes use the term “nuisance.” Other criminal laws expressly prohibited specified conduct as a nuisance, including OCLA sections 23-919 (keeping a bawdyhouse), 23-929 (keeping a gaming house), and 24-142 and 143 (sale of alcohol without a license). Although ORS 161.310 was repealed in 1971, other criminal nuisance laws survive. *See generally* ORS ch 167.

Many criminal nuisance laws were enacted by local governments. For instance, the City of Portland imposed a fine for creating a public nuisance by permitting stagnant water, decaying substances or garbage to accumulate on premises. City of Portland Ordinance No. 928, sec. 4 (1871). *See also* City of Portland Ordinance No. 2994 (1881) (entitled an ordinance “to provide for the prevention and removal of nuisances, and to punish those who allow or maintain them,” prohibiting certain practices relating to, among other things, slaughterhouses, garbage, privies causing a “noisome or offensive smell,” dangerous buildings and awnings, and providing for criminal penalties); City of Portland Ordinance No. 2994 (1892) (similar later ordinance). Based on the case law described below, we believe that such ordinances are common throughout the state and have been since at least the beginning of the 20<sup>th</sup> century.

In addition to criminal nuisance laws, state and local authorities have long used civil “nuisance abatement” authority to control nuisances. The State of Oregon has had a civil nuisance abatement statute dating from 1913. OCLA §§ 9-408 *et seq.* (now codified in part at ORS 105.550 to 105.600); *see State ex rel Haas v. Dionne*, 42 Or App 851, 853-54, 601 P2d 894(1979) (using term “Civil Nuisance Abatement Statute” and citing former ORS 465.110 to 465.990). These statutes prohibited gaming, lotteries, prostitution and places of abortion.

Other state laws declaring that various uses of property are a public nuisance date from at least the 1930s. *See, e.g.*, OCLA § 9-407 (enjoining use of property for prostitution as a nuisance, dating from 1913), OCLA § 107-208-12 (declaring various conditions and conduct relating to risk of fire on forest land a nuisance, dating from 1925), OCLA § 107-261 (pests injurious to timber declared to be a nuisance, dating from 1921), OCLA § 109-313 (soil and water conservation on agricultural lands required to prevent a nuisance, dating from 1930s), OCLA § 116-1126-1127 (water pollution as a nuisance, dating from 1939), OCLA § 116-1101 (prohibiting pollution of water injurious to fish, dating from 1921), and *see generally* OCLA §§ 99-2201 *et seq.* (food safety statutes, dating from 1915).

Cities were authorized in the Incorporation Act of 1893 to declare particular uses of property to be a nuisance and to abate or regulate such uses. ORS 221.915 to 221.916 (previously OCLA §§ 56-401, 56-308). *See also* City of Portland, Ordinance No. 928, Sec. 5 (1871) (giving chief of police authority to abate nuisances criminally prohibited), and City of Portland, Ordinance No. 2994, Sec. 7 (1881) (similar ordinances). An example of the exercise of this authority is found in *Town of Gaston v. Thompson*, 89 Or 412, 174 P 717 (1918). There, the Oregon Supreme Court upheld an ordinance requiring the defendant to keep a millrace covered with planks as a legitimate means of preventing “a menace to the safety of children, who are liable to fall into the [millrace] and be drowned.” *Id.* at 421. In *City of Portland v. Cook*, 48 Or 550, 555, 87 P 772 (1906), the Oregon Supreme Court addressed the City of Portland ordinance regarding slaughterhouses, upholding the ordinance as an exercise of the city’s power for the suppression of nuisances.

In addition, in some cases, specific state statutes authorizing the adoption of local charters also authorized the governments in question to adopt nuisance laws. *See, e.g. State v. Bergman*, 6 Or 341, 1877 WL 1549 (1877) (City of Astoria); *Mutual Irrigation Co. v. Baker City*, 58 Or 306, 113 P 9 (1911) (Baker City). In addition to the authority they derive from state statutes, cities and counties that have adopted charters under the home rule provisions of the Oregon Constitution, Article VI, section 10 (counties), Article IV, section 1(5) and Article XI, section 2 (cities), generally also have the authority to adopt ordinances regulating nuisances unless preempted by state law. *Schmidt v. Masters*, 7 Or App 421, 490 P2d 1029 (1971). Thus, Washington County was held to have authority under its home rule charter to adopt an ordinance regulating the collection of garbage. *Id.*

Based on this context as to the legal meaning of “nuisance laws,” and the ordinary meaning of the text as set forth above, we conclude that “historically and commonly recognized nuisance laws” referred to in subsection (b) of Measure 7 include at least the nuisance laws found today at ORS 105.550 to 105.600 and ORS chapter 167, and their counterparts in local

government ordinances. These types of laws have long been construed as nuisance laws by both judicial and legislative bodies in Oregon, and they descend from Oregon’s early criminal and civil nuisance statutes. In addition, although it is far from certain, we believe it is likely that other state and local enactments that function to prevent harm or injury to the rights of the public or to public health, safety or morals are also “nuisance laws” if they govern a type of use of private property that has been historically and commonly recognized as a nuisance by judicial or legislative bodies in Oregon.

For the reasons explained below, we also conclude that “commonly and historically recognized nuisance laws” do not include those laws that operate primarily to promote the general welfare, those laws described as “economic regulation,” or as “benefit conferring” rather than “harm-preventing.” Such laws do not fall within the plain meaning of the term “nuisance laws,” as their purpose is not to prevent injury or harm.

The history of the treatment of nuisance law under Article I, section 18, of the Oregon Constitution supports this conclusion and helps illustrate the distinction between nuisance laws and other laws. By the terms of its initial clause (“For purposes of this section \* \* \*”), subsection (b) of Measure 7 amends Article I, section 18, of the Oregon Constitution. While the text of Article I, section 18, says nothing about what “nuisance laws” are, there is a substantial body of case law under the Oregon Constitution regarding whether laws that were enacted to prevent or remedy a nuisance require compensation in inverse condemnation. We look to the Oregon decisions as context to assist in determining what the voters intended with regard to “nuisance laws” as that term is used in subsection (b).

The Oregon courts have previously denied compensation under Article I, section 18, where the government was merely exercising its “police power.”<sup>lix/</sup> *State ex rel Schrunk v. Metz*, 125 Or App 405, 867 P2d 503 (1993) (citing *Hughes v. State of Oregon*, 314 Or 1, 34, 838 P2d 1018 (1992)); see also *Suess Builders v. City of Beaverton*, 294 Or 254, 258-259, 656 P2d 306 (1982) (“Regulation in pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land.”). However, the “police power” doctrine began in Oregon, as elsewhere, primarily as a means of describing the use of the government’s legislative authority to regulate the use of property to prevent, limit or abate a nuisance. Thus, in *State v. Bergman*, 6 Or 341, 343 (1877), the court upheld the right of the City of Astoria to enact a “police regulation \* \* \* in order to prevent nuisances”; in *City of Portland v. Meyer*, 32 Or 368, 370-371, 52 P 21 (1898), the court upheld the authority of the city to prohibit an existing slaughterhouse in order to protect the public health, and as not violating any constitutional right of the owner; and, in *City of Portland v. Cook*, 48 Or 550, 87 P 772 (1906), another slaughterhouse case, the court stated that:

[t]he preservation of the public health and public morals is a duty devolving on the state, the discharge of which is denominated an exercise of the police power.

\* \* \* \* \*

All property is acquired and held subject to the rule that it shall be so used as not to injure another, and though at the time of establishing a lawful enterprise in a place where the probability of injury to others \* \* \* is remote, if the undertaking should become offensive \* \* \*, whereby the public health is

menaced, the business must yield to the paramount right of an exercise of the police power for the suppression of nuisances.

*Id.* at 554-555 (citations omitted).

In contrast, early in our state’s history, regulation of the use of private property *not* based on the prevention or abatement of harm or injury to the public health, safety, morals or rights was held to be an unreasonable encroachment on private property rights. *City of Portland v. Yates*, 102 Or 513, 199 P 184 (1921) (reversing conviction of property owner for violating local sign ordinance); *Hill Military Academy v. City of Portland*, 152 Or 272, 283-84, 53 P2d 55 (1936) (rejecting city’s action to condemn building for code violations where building was not determined to be a nuisance).

The problem with the “police power” doctrine, and the particular potential for confusion in the context of the nuisance exception in subsection (b) of Measure 7, is that beginning in the 1920s the Oregon courts extended the doctrine beyond nuisance prevention and abatement to virtually all types of governmental action, including legislation to promote the general welfare. In *Kroner v. City of Portland*, 116 Or 141, 240 P 536 (1925), the Oregon Supreme Court used the “police power” doctrine to uphold the authority of the City of Portland to enact and apply its zoning ordinance to prohibit particular uses of property in particular locations against the claim that the ordinance resulted in a taking under Article I, section 18. In a sharp dissent, Chief Justice McBride laid out the more traditional case that laws that go further than preventing a nuisance are beyond the “police power,” and therefore require just compensation as a taking of property:

There is no semblance of a nuisance in the nature of the proposed business. A grocery store, where groceries are sold, milk, cream, and butter distributed and lunches served to customers, cannot be held either a nuisance or a *quasi* nuisance. Neither can we anticipate that it may become a nuisance. \* \* \* There is nothing in the evidence to show that such a business or store building, would affect detrimentally the public health, public morals, public safety, or general welfare of the City of Portland although there is a mild pretense that it might do so. \* \* \*

\* \* \* \* \*

The question then is whether a legitimate business can be prohibited or the construction of a useful building interfered with when it is *prima facie* outside the scope of the police power.

A lawful business, harmless in its nature, and not dangerous to the public either directly or indirectly, cannot be subjected to a police regulation whatever.

\* \* \* \* \*

\* \* \* All matters relating to the public health, public morals, and public safety are clearly within the police power. The chief trouble in the definition of the police power seems to be to ascertain the limitations of the general welfare phase of the police power. When can the police power be exercised for the



general welfare? Can a man's property or vested rights be interfered with apart from matters relating to the public health, public morals or public safety, and be placed alone on the grounds of public welfare apart from these considerations? In other words, is the general welfare alone a sufficient basis for the exercise of the police power apart from any other reasons? We believe that, generally speaking, it is not. A man's vested rights cannot be taken away for the general welfare without just compensation. Property taken for the general welfare alone is equivalent to a taking for public use and comes more properly within the field of eminent domain. If we are to allow the taking of private property for the general welfare alone and without regard to the injurious use of such property, we have reached the point in our judicial evolution where private property has no further protection except the whim of the dominant majority. \* \* \*

\* \* \* \* \*

A private business which is harmless cannot be sacrificed on the altar of the public welfare. It is only when it is harmful in its nature or capable of working injury that it may be regulated for the public welfare. \* \* \*

**Kroner** at 157-162. We believe that the dissenting opinion in **Kroner** reflects the essential divide between laws that are likely to be "nuisance laws" under subsection (b) of Measure 7, and those that are not.

Laws that regulate or prohibit the use of private real property in order to promote the general welfare, such as legislation to promote particular economic interests or to maintain or increase property values, are not historically recognized as nuisance laws even if they have more recently been characterized as within the "police power." See **Daniels v. City of Portland**, 124 Or 677, 265 P 790 (1928) (upholding minimum room size requirements as applied to hotel); **Berger v. City of Salem**, 131 Or 674, 284 P 273 (1930) (general zoning laws to promote public welfare); **Savage v. Martin**, 161 Or 660, 91 P2d 273 (1939) (upholding Oregon Milk Control Act against a regulatory takings challenge on basis of "police power" to correct economic evils); *but see State ex rel Peterson v. Martin*, 180 Or 459, 176 P2d 636 (1947), *reversed on other grounds* **Safeway Stores v. State Bd. of Agriculture**, 198 Or 43, 255 P2d (1953) (describing violation of same Act as public nuisance). Similarly, laws that resolve or mediate what are essentially political conflicts over the use of land, while formerly held to be within the "police power," are distinguishable from laws that "\* \* \* prevent injury to others." See **Boise Cascade Corp. v. Board of Forestry**, 325 Or at 197 (citing **Fifth Avenue Corp. v. Washington County**, 282 Or at 613, 581 P2d 50 (quoting **Fred F. French Inv. Co., Inc. v. City of New York**, 350 NE 2d 381, 384-86 (NY 1976) (citing Joseph L. Sax, *Takings and the Police Power*, 74 YALE LJ 36, 62-63 (1964)), *cert den* 429 US 990, 97 S Ct 515, 50 L Ed2d 602 (1976)).

We recognize that distinguishing whether a particular law functions to prevent or abate harm, as opposed to conferring benefits or promoting the general welfare, is a difficult task. The difficulties attendant to the shifting position of the harm-preventing/benefit-conferring line in the United States Supreme Court's nuisance-based takings jurisprudence have been evident for a long time, and led to the abandonment of that test under the United States Constitution in favor of a background principles analysis. See **Lucas v. South Carolina Coastal Comm.**, 505 US at

1024 (“the distinction between ‘harm-preventing’ and ‘benefit conferring’ regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature [to prohibit the use of beachfront land] in the present case.” (emphasis in original)).

To clarify the types of laws that are “nuisance laws” as opposed to those to promote the general welfare, we provide the following summary of cases denying compensation under Article I, section 18, on the basis that the challenged law involved the protection of public rights, health, safety or morals. These cases are found primarily in the areas of the civil forfeiture laws, and state and local nuisance abatement laws. First, in *Willard v. City of Eugene*, 25 Or App 491, 550 P2d 457 (1976), the city demolished the plaintiff’s house to abate a nuisance. The city’s action was alleged to be a taking under Article I, section 18. The court held that there could only be a taking of property under Article I, section 18, where the government takes the property for a *public use*. *Id.* at 494 (citing *Smith v. Cameron*, 106 Or 1, 8-9, 210 P 716 (1922)). By acting under its police power to regulate or restrict activities that are *harmful to the public*, rather than under its eminent domain authority to *acquire* property for the use and benefit of the public, the city was held not to be liable in inverse condemnation. *Accord Shaffer v. City of Winston*, 33 Or App 391, 576 P2d 823 (1978) (city’s ordinance declaring failure to comply with residential maintenance code a public nuisance upheld against a takings challenge as valid police power basis for destruction of building); *see also Emery v. State*, 297 Or 755, 766-767, 688 P2d 72 (1984) (state’s use of personal property in criminal trial held not to be a taking for public use); *Benson v. City of Portland*, 119 Or App 406, 850 P2d 416, *rev den* 318 Or 24, 862 P2d 1304 (1993) (“police power” to regulate derelict buildings upheld).

Similarly, in *State ex rel. Haas v. Dionne*, 42 Or App 851, 601 P2d 894 (1979), and *State ex rel. Haas v. Club Recreation and Pleasure*, 41 Or App 557, 599 P2d 1194 (1979), the owners of real property alleged to have been used for prostitution claimed that the closure of their buildings for all purposes for a period of one year under Oregon’s civil nuisance abatement laws, ORS 105.505 to 105.600, was a taking of their property. The Oregon Court of Appeals summarily disposed of the takings claim, stating that: “[w]hile the owner may be temporarily deprived of the use of the real property and will permanently lose the use of personal property used for conducting the nuisance, the state has a valid interest in prohibiting the illegal use of property.” *Id.* at 566.

The cases also reflect that the courts have used nuisance-prevention as the basis for refusing compensation for regulations in cases involving harm or injury to public rights. In *State ex rel. Cox v. Hibbard*, 31 Or App 269, 570 P2d 1190 (1977), the court denied a state takings claim stemming from the denial of a permit to remove material from the bed of a creek on the basis of the state’s power to prevent a nuisance. *Id.* at 275 (citing *Willard v. City of Eugene*). And in *State v. Webber*, 85 Or App 347, 350 P2d 220 (1987), the Oregon Court of Appeals denied a takings challenge to statutes and rules prohibiting the killing of deer when the property owner’s crops were being destroyed by the deer. The court held that the laws were a reasonable restriction on the ownership of property to protect public rights in wildlife (again citing *Willard v. City of Eugene*), *but see Boise Cascade v. Board of Forestry*, 164 Or App at 128 (“It does not follow, as the state seems to posit, that any act taken by the state to protect *ferae naturae* on

private property is the equivalent to an abatement of a public nuisance or, alternatively, any act by a private party to destroy *ferae naturae* on private property constitutes a public nuisance.”).

In summary, we believe that the “historically and commonly recognized nuisance laws” referred to in subsection (b) of Measure 7 include at least the civil nuisance laws found today at ORS 105.550 to 105.600, the criminal nuisance laws found at ORS chapter 167, and their counterparts in local government ordinances. These laws prohibit owners of real property from using that property for prostitution, gambling or lotteries, and the unauthorized delivery, manufacture or possession of a controlled substance.<sup>lx/</sup>

While not as clear, we believe it more likely than not that other state and local laws that function to prevent harm or injury to the public health, safety, morals or to public rights are also “nuisance laws” if the type of use they restrict or prohibit has historically and commonly been recognized as a nuisance by judicial decision or by state or local legislative determination, and the use is regulated to prevent harm or injury rather than to promote public welfare or to adjust economic relations between persons.<sup>lxi/</sup> Under this test, in order to come within subsection (b) of Measure 7, a law has to both prevent or remedy harm or injury to public health, safety, morals or rights, and concern a type or category of use regulated as a harm or injury over time and widely throughout the state. A statement by the public entity adopting or issuing the law that declares the use to be a nuisance is unlikely to be sufficient, by itself, to make it a “nuisance law” if in fact the law does not operate to prevent harm or injury, although the legislative determination is likely to be given some weight in terms of the purpose of the law. Finally, the voters’ limitation of exempt nuisance laws to those “historically and commonly recognized” clearly prevents the legislature or local governments from using a declaration to create a new class of nuisance laws, and thus a new class of exceptions under subsection (b) of Measure 7.

A significant question is the extent to which courts will require an individualized showing that each law, in each of its applications, is within the exception. In *Gaston*, 89 Or 412, the court implied that there must be a nuisance in fact in order for an activity to be abated as a nuisance. Cases decided both before and after *Gaston*, however, make clear that whether a particular activity or use may be abated hinges on the relationship between the purpose of the activity alleged to be a nuisance, and the harmful or hurtful character of that activity or class of activities generally.

Where the activity alleged to be a nuisance has a public purpose, there must be a finding that the particular activity is in fact a nuisance before that activity may be abated. See *Savage v. City of Salem*, 23 Or 381, 385, 31 P 832 (1893) (street sprinkling is a public purpose; water tanks erected by plaintiff for use in street sprinkling cannot be abated by city absent a showing that they were in fact a nuisance). If, on the other hand, the activity is being undertaken for a private purpose but interferes with a public right, then the activity or class of activities may be prohibited based upon a finding that the class of things to be prohibited is of a hurtful character. See *McGowan v. City of Burns*, 172 Or 63, 137 P2d 994 (1943) (concrete apron approaches constructed on street side of curb thereby encroaching on right of way are nuisances per se that must be abated because city’s street superintendent deemed such structures menaces to safety of pedestrians and motorists); see also *State ex rel. Peterson v. Martin*, 180 Or at 466 (“open and continuous violation of a statute [Oregon Milk Control Act’s licensing provision] reasonably

calculated to preserve public health \* \* \* constitutes a public nuisance” which may be enjoined even without showing of harm to public health or economic well being of the milk market).

Based on the cases cited above, *see also Spencer v. City of Medford*, 129 Or at 341, we believe that the courts will make this determination on the basis of the purpose and effect of each law generally, instead of whether in each case there is a specific, identifiable harm or injury that constitutes a nuisance. At the same time, while the courts are likely to give some weight to how the body adopting the law has characterized it, they will independently review the function and effect of the law to determine if it comes within subsection (b).

Examples of laws that appear to function to prevent harm or injury to the public health, safety, morals or rights, and that appear to be historically and commonly recognized as nuisance laws at the local level, are: local ordinances that authorize the abatement of unsafe conditions in buildings (*see also* ORS 215.615), most local health and sanitation ordinances relating to the use of real property, most aspects of local fire and building codes, and local ordinances relating to access to public streets. At the state level, examples of the types of laws that we believe meet this test include: the sanitation requirements for pools in ORS 448.060, the sanitation requirements for water supply systems in ORS 448.265, the prohibition on the pollution of waters of the state without a permit in ORS 468B.025, and the requirements that forest lands have adequate fire protection in ORS 477.022. Each of these laws has been in effect for a substantial period of time throughout all or most of the state, and each is clearly directed toward the prevention of harm or injury to the public health, safety, morals or to public rights. Laws that are more recent and, if local, are not widespread throughout the state are less likely to be within subsection (b), particularly if they concern a type of use that has not previously been regulated as a nuisance. This is true even if such laws clearly operate to prevent harm or injury to public health, safety, morals or rights. Thus, we believe that recently adopted local laws prohibiting the smoking of tobacco in all areas of restaurants and bars may not be “historically and commonly recognized nuisance laws.” *But see* ORS 433.835 to 433.875, Oregon Indoor Clean Air Act (first adopted in 1981). Even more clearly, the recently adopted provisions relating to restrictions on use of real property to prevent harm from rapidly moving landslides, Or Laws 1999, ch 1103 (SB 12), are unlikely to be a historically recognized nuisance law.

More generally, and as described above, it is unlikely that subsection (b) extends to laws involving economic regulation of the use of real property for the general promotion of public welfare, such as laws designed to enhance, improve or protect property values including most zoning and land use laws, laws relating to aesthetic considerations such as building design, height or setback requirements, solid or hazardous waste laws (in at least some cases), many licensing requirements for the use of property for particular purposes, and at least some laws relating to the use of real property for private schools and health care facilities. Also included within this category are the state’s landlord-tenant laws and laws regulating the sale of real property. In short, we believe that the voters intended by exempting “nuisance laws” from the otherwise applicable requirement for just compensation when a regulation restricts the use of real property to return to the rule stated by Chief Justice McBride in his dissenting opinion in *Kroner*, i.e., that the law must do no more than prohibit or restrict a use in order to avoid harm or injury to the public health, safety, morals or public rights.

Finally, the nuisance laws exception in subsection (b) ordinarily will not extend to activities that Measure 7 explicitly treats as compensable, such as requirements to protect, provide or preserve “wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archaeological or cultural resources, or low income housing.” Laws imposing such requirements appear to require compensation under subsection (e) of the Measure. As noted, however, Measure 7 does not purport to grant property owners the right to maintain a public nuisance. As a result, where a private use of real property would affect these things (habitat, wetlands, cultural resources, etc.) in a manner that would be a public nuisance at common law, we believe state and local government may continue to limit or even prohibit the use without the payment of compensation.

In some cases it will be hard to draw the line between nuisance laws that are not compensable under Measure 7 because they restrict a use that the owner has no right to maintain, and nuisance laws that go beyond the common law and therefore come within the exception in subsection (b). As a practical matter, such line drawing is largely unnecessary because the laws in question will not give rise to compensation in either event.

### **B. Newly Adopted Laws**

By its terms, the exception in subsection (b) of Measure 7 includes “the adoption \* \* \* of historically and commonly recognized nuisance laws.” Thus, newly adopted laws can come within the exception if they are “nuisance laws,” and they are “historically and commonly recognized” as such. The most common example of this is the adoption of a new “nuisance law” by a particular local government when similar laws are widely in effect in other local jurisdictions, and those laws had been in effect for a substantial period of time. Thus, for instance, if a city adopts an ordinance regulating the use of property for prostitution, it would likely be within the exception.

### **C. “Narrowly Construed”**

After stating the exception, subsection (b) provides that “[t]he phrase ‘historically and commonly recognized nuisance laws’ shall be narrowly construed in favor of a finding that just compensation is required” under Measure 7. We interpret this as an instruction to the Oregon courts that they should resolve any ambiguity of this portion of Measure 7 in favor of holding that the exception does not apply, and that compensation is due. We have followed this instruction above in determining that laws preventing harm or injury to the public welfare, as opposed to traditional government regulation to prevent harm to public safety, health or morals, are unlikely to come within the exception. Further, in cases involving the issue of whether a particular law is “historically and commonly recognized” as a nuisance law, we believe the courts will hold that a law comes within subsection (b) of Measure 7 only where there is a substantial history of regulation of the type of use throughout a significant part of the state.

## **VIII. Federal Requirement Exception**

Subsection (c) of Measure 7 provides that 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.” We are asked two questions about this provision: when does a regulation “implement a requirement of federal law,” and what is meant by “to the minimum extent required.”

### **A. Regulation to Implement a Requirement of Federal Law**

To determine when a regulation implements a requirement of federal law, we must first ascertain the meaning of “federal law.” We conclude above in Part VII A of this opinion that the voters did not intend the term “laws” as used in the exception for nuisance laws in subsection (b) of the Measure to refer only to statutes, but to have its ordinary meaning. The ordinary meaning of “law” includes not only statutes but also rules, ordinances, orders, resolutions, judicial decisions and other controlling authority. *See* WEBSTER’S at 1279. For the same reasons discussed above, we conclude that the term “federal law” in subsection (c) of the Measure includes not only federal statutes but also federal regulations, as well as orders and judicial decisions to the extent that they interpret federal statutes and regulations.

The relevant definition of the word “requirement” is “something called for or demanded : a requisite or essential condition.” WEBSTER’S at 1929. Thus, a “requirement” of federal law is something that federal law calls for or demands.

The relevant definitions of the word “implement” are:

**1 a :** to carry out : ACCOMPLISH, FULFILL \* \* \* ; *esp* : to give practical effect to and ensure of actual fulfillment by concrete measures \* \* \* <an agency created to [implement] the recommendation of the committee> <programs to [implement] our foreign policy> **b :** to provide instruments or means of practical expression for \* \* \* .

WEBSTER’S at 1134-35. Thus, a regulation implements a requirement of federal law when the regulation carries out federal law, in the sense of giving it practical effect.

We can illustrate such implementation with various examples of ways that Oregon has adopted laws implementing the requirements of federal laws, in the sense of giving practical effect to those federal requirements. As one example, ORS 447.210 to 447.280 were passed by the Oregon legislature to carry out the federal Americans with Disabilities Act (ADA), 42 USC §§ 12101 *et seq.* ORS 447.220 states:

It is the purpose of ORS 447.210 to 447.280 to make affected buildings, including but not limited to commercial facilities, public accommodations, private entities, private membership clubs and churches, in the state accessible to and usable by persons with disabilities, as provided in the Americans with Disabilities Act \* \* \* .

Title III of the of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of facilities or accommodations and requires the owners of new and existing facilities to make reasonable modifications to remove structural barriers to access by the

disabled. 42 USC §§ 12182-83. Thus, the owners of private real property open to the public, such as a restaurant, must ensure the opportunity for full and equal enjoyment of the facilities by the disabled. *See, e.g., Long v. Coast Resorts, Inc.* 32 F Supp 2d 1203 (D Nev 1998). Although Title III does not apply directly to state and local government, 42 USC § 12181(7), Title II of the ADA, 42 USC § 12131-12165, prohibits state or local governments from discrimination against qualified individuals on the basis of disability in the services, programs or activities of a public entity. And some courts have held that Title II prohibits state regulatory actions that allow private persons to violate Title III of the ADA. Thus, Title II has been applied to require the State of Oregon to amend its rules governing establishments that contract to sell lottery tickets to require that they be accessible to persons with mobility impairments. Settlement Agreement Between the United States of America and the State of Oregon, acting by and through its Oregon State Lottery Commission, dated September 16, 1997. In some aspects, these rules require the owners of private real property to make modifications to the premises where lottery tickets are sold to ensure access to persons with mobility impairments. *See* OAR 177-040-0070(4). Title II has also been held to apply to local government's zoning regulations regulating the use of private property. *Bay Area Addiction v. City of Antioch*, 179 F3d 725 (9<sup>th</sup> Cir 1999); *Innovative Health Systems v. City of White Plains*, 931 FSupp 222 (SD NY 1996), *aff'd in part*, 117 F3d 37 (2<sup>nd</sup> Cir 1997). Finally, under the federal regulations implementing Title III of the ADA, the U.S. Department of Justice may certify that state or local laws, local building codes or similar ordinances comply with Title III of the ADA. 28 CFR Part 36, Subpart F. Such certification "eliminates conflicts between local requirements and ADA requirements" and allows property owners a rebuttable presumption that facilities that comply with the certified code also comply with the federal ADA requirements. 28 CFR § 36.602.

As another example, the Oregon legislature has passed laws to carry out the federal Endangered Species Act (ESA), 16 USC §§ 1531-1544. The ESA prohibits any person, including a state, from "taking" any endangered species of fish or wildlife within the United States and prohibits any person, including a state, from causing another person to do so. 16 USC § 1538(a), (g). "Take" under the ESA has been defined as including the modification of habitat that kills or injures protected wildlife. 50 CFR § 17.3; *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 US 687, 115 S Ct 2407, 132 L Ed2d 597 (1995). These prohibitions have been held to require state and local governments to pass or enforce regulations governing the use of property so as to avoid the "taking" of threatened or endangered species. *Loggerhead Turtle v. Volusia County*, 148 F3d 1231, 1251 (11<sup>th</sup> Cir 1998), *cert den* 526 US 1081, 119 S Ct 1488, 143 L Ed2d 570 (1999) ("At least two circuits, the First and the Eighth, have held that the regulatory acts of governmental entities can cause takes of protected wildlife."); *Strahan v. Coxe*, 127 F3d 155, 158, 163 (1<sup>st</sup> Cir 1997), *cert den* 525 US 830, 119 S Ct 81, 142 L Ed2d 63 (1998). Several Oregon statutes implement ESA requirements. *See, e.g.,* ORS 197.460 (requires counties to ensure that any destination resort "is compatible with the site" and that "habitat of threatened or endangered species \* \* \* shall be retained"), ORS 517.830(5) (authorizing new conditions on surface mining permits if the activity will result in taking of a species), ORS 517.956 (prohibiting loss of critical habitat for federally-listed species as a result of chemical process mining), ORS 527.710 (Forest Practices Act rules relating to federally-listed threatened or endangered species). As with the ADA, the ESA both requires that property be used in a particular way and requires that state and local governments implement those requirements, at least in certain circumstances.

Other federal laws establish an arrangement under which Congress has set nationally applicable requirements and provided for a continued state or local role in implementing those requirements within some permissible range of discretion. The United States Supreme Court has described this arrangement as follows:

where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes.

*New York v. United States*, 505 US 144, 167-68, 112 S Ct 2408, 120 L Ed2d 120 (1992) (citations omitted). See also *Salem College & Academy, Inc. v. Employment Div.*, 298 Or 471, 477, 695 P2d 25 (1985).<sup>lxiii/</sup>

One example of cooperative federalism is the federal Water Pollution Control Act (FWPCA), 33 USC §§ 1251-1387, and the state water quality "regulations" adopted in Oregon as in other states. See generally ORS ch 468B; OAR ch 340, divs 41 to 56. In *City of Klamath Falls v. Environmental Quality Com'n*, 318 Or 532, 870 P2d 825 (1994), the Oregon Supreme Court noted that the states are required by the FWPCA to adopt water quality standards and that the Oregon legislature generally has assigned the state's responsibility to implement the federal Act to the Environmental Quality Commission (EQC). The court went on to describe the relationship between state and federal law in the following manner:

That Act [FWPCA] also requires that states submit their standards to the Environmental Protection Agency (EPA) so that EPA may review the standards for compliance with the Act. EPA may either approve the standards or notify the state of changes required to bring the standards into compliance with the Act. Should a state fail to submit standards to EPA, or fail to make the changes required by EPA, EPA must then promulgate standards for that state. When EPA approves a state's proposed standard, that standard "shall thereafter be the water quality standard of the state." In sum, Oregon's water quality standards are mandated by state, as well as federal, law; and one of the purposes of these standards, under both state and federal law, is to protect fish.

*Id.* at 540-41 (citations and footnotes omitted).

Other federal laws that similarly provide for a state or local government role in implementing federal law, and the resulting state laws, include the Clean Air Act, 42 USC §§ 7401-7671q, and the Oregon clean air laws, ORS ch 468A; the Occupational Safety and Health Act, 29 USC §§ 651 *et seq.*, and the Oregon Safe Employment Act, ORS ch 654; and the Resource Conservation and Recovery Act, 42 USC §§ 6901 *et seq.*, and the state laws at ORS 459.046 and 466.086. While not every aspect of state or local law in the areas of water and air quality, occupational health and safety, and solid waste (and other "cooperative federalism



laws”) operates to give practical effect to the requirements of these federal laws, many of them do. As a general matter, we believe that many of the provisions of these laws operate to carry out something that is “called for” or even “demanded” by federal law, and are therefore within the scope of the ordinary meaning of a “regulation to implement a requirement of federal law.” We caution that this does not mean that *all* aspects of such state or local laws come within this description.

Additionally, provisions of an interstate compact entered into pursuant to the Compact Clause of the United States Constitution, Article I, section 10, may implement a requirement of federal law. Under the Compact Clause, the federal government may authorize the states to regulate in areas that would, in the absence of a compact, impermissibly discriminate against interstate commerce or otherwise infringe on federal supremacy. *New York v. U.S.*, 505 US at 173; *Northeast Bancorp v. Board of Governors, FRS*, 472 US 159, 175, 105 S Ct 2545, 86 L Ed2d 112 (1985); *Dyer v. Sims*, 341 US 22, 26-27, 71 S Ct 557, 95 L Ed 713 (1951). Of course, the states entering into an interstate compact must also consent to the compact, but once it is formed, the circumstances under which the states may withdraw from the compact may be limited. *See id.* at 30-31. Moreover, Congress’ consent to the compact under Article I, section 10 of the United States Constitution “transforms the States’ agreement into federal law.” *Cuyler v. Adams*, 449 US 433, 440, 101 S Ct 703, 66 L Ed2d 641 (1981). *See also Oregon v. Burss*, 316 Or 1, 4, 848 P2d 596 (1993). Thus, where the state has entered into an interstate compact and that compact has been approved by Congress, any state statute or administrative rule implementing the compact would likely be a “regulation implementing a requirement of federal law.”

## **B. Impose a Regulation to the Minimum Extent Required**

The exception in subsection (c) of Measure 7 is not satisfied merely because a regulation implements a requirement of federal law. Subsection (c) provides that a regulating entity “may impose, to the minimum extent required,” a regulation to implement a requirement of federal law. We are asked what is meant by the phrase “may impose, to the minimum extent required.”

The common meaning of the word “impose” is

**3 b** (1) to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable <[impose] a duty on a city official> <the obligations [impose]d by international law> \* \* \*.

WEBSTER’S at 1136. This term encompasses both the governmental act of passing a regulation and of enforcing a regulation. (The phrase “government passes or enforces a regulation” is discussed in Part III of this opinion.) Thus, subsection (c) applies to the situation where a regulating entity either passes or enforces a regulation to implement a requirement of federal law.

The next issue is what the clause “to the minimum extent required” modifies. Grammatically, due to its location in the sentence, this clause modifies the verb “impose.” Hence, the regulating entity may impose (to the minimum extent it is required to do so) a

regulation to implement a requirement of federal law. Because of this grammatical structure, we believe that the voters intended the exception in subsection (c) of Measure 7 to apply only if (1) the regulating entity is required to impose the regulation, and (2) the scope of the regulation is the minimum that the regulating entity is required to impose.

### 1. “Required” to Impose a Regulation

Because the limitation “to the minimum extent required” modifies the verb “impose,” we conclude that the voters intended the exception in subsection (c) of Measure 7 to apply only if the regulating entity is “required” to impose the regulation. The word “required” has no obvious subject to identify who or what might be requiring the regulating entity to impose the regulation. Intuitively, one might expect that the voters intended to refer to federal law. We are reluctant to conclude, however, that the federal law, the requirements of which are being implemented, is the only source of the regulating entity’s mandate to impose the regulation because there is nothing in the actual text of subsection (c) to suggest such a limited interpretation. Moreover, if that were what was intended, the sentence could more simply have stated that “a regulating entity may impose a regulation to implement federal law if required to do so by that law.” Consequently, although not without significant doubt, we believe that the source of the regulating entity’s duty to impose the regulation is not limited to the federal law being implemented.<sup>lxiii/</sup>

Before discussing the possible sources of the mandate on the regulating entity to impose a regulation to implement a federal requirement, we consider the meaning of the word “required.” The relevant dictionary definitions of the word “require” are:

**3 a :** to call for as suitable or appropriate in a particular case : need for some end or purpose <contributions to American art [require] more detailed treatment – *Amer. Guide Series: Minn.*> **b :** to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation) \* \* \* <no religious test shall ever be *required* as a qualification – *U.S. Constitution*> \* \* \* **c :** to demand as a necessary help or aid : need as an essential : stand in urgent need of : NEED, WANT <growing children [require] more food> \* \* \* **5 :** to impose a compulsion or command upon (as a person) to do something : demand of (one) that something be done or some action taken : enjoin, command, or authoritatively insist (that someone do something) <a farmer will be *required* to comply with all acreage allotments – *Nation’s Business*> \* \* \*.

Webster’s at 1929. Thus, something may be “required” if it is either compelled or commanded, or if it is demanded as necessary or essential or even if it is called for as needed for some end or purpose.

Any of several sources might have authority to require a regulating entity (e.g., state or local government) to impose a regulation to implement a requirement of federal law – federal law, state or local law, a court order or a contract. We discuss each of these.

### a. Federal Law

Under our federal constitutional system of government, state and local government generally cannot be required to implement federal law or to enact or enforce federal laws in the strict sense of being compelled to do so. The United States Supreme Court has warned that “this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.” *Printz v. United States*, 521 US 898, 899, 117 S Ct 2365, 138 L Ed2d 914 (1997) (quoting *FERC v. Mississippi*, 456 US 742, 761, 102 S Ct 2126, 72 L Ed2d 532, *rehearing den* 458 US 1131, 103 S Ct 15, 73 L Ed2d 1401 (1982)). Further, the court has held, “[T]he Constitution simply does not give Congress the authority to require the States to regulate.” *New York v. United States* 505 US at 178.

Thus, under the United States Supreme Court’s decisions over the past two decades, the federal government cannot command the states to pass or enforce laws or regulations to implement federal law. The federal government may (and, as described below, does) use its enumerated powers to encourage or even call on the states to carry out federal objectives, and the force of those powers may be quite strong in particular circumstances, but the federal government cannot directly command the states. In other words, giving the word “required” a narrow meaning would result in subsection (c) having no effect at all with respect to any federal laws in light of the U.S. Supreme Court’s decisions regarding federal-state relations. As a result, we believe the voters intended the term “required” to reflect its broader meanings, i.e., as including something called for rather than a direct mandate.

In describing such requirements, the most we can do at this time is to point out what we believe is essentially a continuum of ways that the federal government “demands” state and local governments to implement federal objectives. The degree of influence or power over the state and local governments varies depending on which federal power or powers a particular federal law relies upon, and many rely on more than one. As a general matter, we believe that the greater the level of influence or power the federal law exerts, the more likely it is that state or local governments are “required” by federal law to impose the regulation within the meaning of subsection (c) of Measure 7.

The Tenth Amendment to the United States Constitution reserves to the states those powers not delegated to the United States by the Constitution. At the same time, the Supremacy Clause, Article VI, clause 2, provides that the laws of the United States shall be the supreme law of the land and therefore acts as a limit on state authority. *See generally New York v. U.S.*, 505 US at 157-159.

Under the Commerce Clause, Article I, section 8, clause 3, the federal government may regulate the use of private property directly in order to foster and protect interstate commerce. *Id.* at 158-160; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264, 282-83, 101 S Ct 2352, 69 L Ed2d 1 (1981). Similarly, under its treaty powers, Article VI, the federal government may regulate private persons in order to carry out treaties with other nations. *Missouri v. Holland*, 252 US 416, 40 S Ct 382, 64 L Ed 641 (1920). Congress may exercise its Commerce Clause or treaty powers so as to preempt state regulation of the same subject matter

under the force of the Supremacy Clause, Article IV, clause 2. *New York v. U.S.*, 505 US at 159-60.

Alternatively, rather than preempting state regulation, the federal government may elect to exercise its Commerce Clause and treaty powers in a manner that provides the states an opportunity for a continuing regulatory role in carrying out federal objectives. *Id.* at 167-168. Federal reliance on state regulatory action to implement federal objectives exceeds the constitutionally delegated authority of the federal government only if it is expressed as a *command* to the states regarding their executive or legislative powers, rather than giving them a choice between either exiting all or part of the field (through preemption), or continuing to regulate but now in conformance with federal as well as state law. *Id.*; see also *FERC v. Mississippi*, 456 US at 759-61. Where Congress exercises its Commerce Clause or treaty powers in a way that gives state or local government a role in carrying out its objectives in an area where federal law would otherwise preempt state regulation, the federal government comes about as close to commanding the states to do something as it may constitutionally do. We believe that this comes within the voters' understanding of the word "requires," as used in the phrase "to the minimum extent required."

Under its spending power, Article I, Section 8, clause 1, the federal government may "fix the terms on which it shall disburse federal money to the States." *New York v. U.S.*, 505 US at 158 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 US 1, 17, 101 S Ct 1531, 67 L Ed2d 694 (1981)). Within certain limits, this power includes both the power to induce the states (prospectively) to regulate in a particular way to implement federal law, and the power to penalize states that fail to implement federal law by withholding funds that the state would otherwise receive or even be entitled to. *New York v. U.S.*, 505 US at 167; *South Dakota v. Dole*, 483 US 203, 107 S Ct 2793, 97 L Ed2d 171 (1987) (spending power permits Congress to condition highway funds on States' adoption of minimum drinking age). With respect to the inducement of additional funds, the state or local government has a choice – it can accept the offer of federal monies in return for implementing something that the federal government has found to be desirable, or it can refuse the offer. We do not believe that a state or locality is "required" to do something by federal law for purposes of subsection (c) of the Measure when federal law offers an inducement of new or additional federal funding to the state or locality if they regulate in a particular manner.

With respect to a federal law that penalizes state or local government by reducing or eliminating federal funding if they do not regulate in a particular manner, the state or local government may, as a practical matter, need to terminate or significantly curtail an ongoing function if it fails to regulate in a manner that implements the federal law. Nevertheless, although the force of the federal spending power appears more akin to a "call for" something, or even a "demand," the state or local government still has a choice not to regulate. Although our conclusion with respect to this situation is not free from doubt, we do not believe that in this case the regulation is "required" by federal law within the meaning of subsection (c) of Measure 7, even if there is some "requirement of federal law" that the state could choose to implement. (In some cases, however, state and local governments may be contractually bound to continue using their regulatory powers to implement the requirement of federal law under the terms of

intergovernmental agreements already entered into as a condition of receipt of funds. We discuss these circumstances, below, under Contracts.)

Finally, as noted above, the provisions of an interstate compact entered into pursuant to the Compact Clause of the United States Constitution is transformed into federal law when the compact is approved by Congress. *Cuyler v. Adams*, 449 US at 440. Thus, to the extent the state has agreed under the terms of such a compact to implement a requirement of federal law, the state would be “required” to do so by federal law.

We recognize that the foregoing analysis leaves a substantial degree of uncertainty regarding when a regulating entity is “required” by federal law to impose a regulation for purposes of the exception in subsection (c) of the Measure. That uncertainty is a result of the particular words used in this portion of the Measure and will only be definitively resolved by the courts.

#### **b. State or Local Law**

A regulating entity may also be required by state or local law to implement a requirement of federal law. “Even if an agency is not required to adopt a rule, once it has done so it must follow what it adopted.” *Peek v. Thompson*, 160 Or App at 265 (citing *Harsh Investment Corp. v. State Housing Division*, 88 Or App 151). Just as state agencies are required to comply with state statutes and state administrative rules, local government is required to comply both with state law, and with its own local laws. *West Hills & Island Neighbors, Inc. v. Multnomah County*, 68 Or App 782, 683 P2d 1032, *rev den* 298 Or 150, 690 P2d 506 (1984).

Where a state or local government has bound itself to impose a regulation to implement a requirement of federal law, it is no less obligated than if it were bound to do so by federal law directly, or (as described below) by court order or contract. Although the government may always elect to repeal the law that requires it to impose a regulation implementing federal law, until it does so it remains obligated to proceed. As a result, we believe it is likely that where existing law (in effect pre-Measure 7) requires state or local government to adopt or enforce regulations to implement a requirement of federal law, such state or local laws may serve as the source of the mandate called for under subsection (c) of Measure 7. At the same time, we do *not* believe that a court would likely find that a state or local government may, after the effective date of Measure 7, elect to “require” itself to implement a requirement of federal law. In this circumstance, the state or local government is acting voluntarily, and it cannot “bootstrap” itself into a situation where it has “required” itself to impose a regulation.

#### **c. Court Orders**

In some situations, a state or local government may be required by court order to impose a regulation to implement a requirement of federal law. We recognize that in these situations the court is acting to carry out federal or state law and that therefore, in a certain sense, a court as the source of compulsion is not distinct from the laws it is carrying out. Nevertheless, in these cases the court’s interpretation of the federal law is likely to be greater in immediacy and degree of

definition than in situations where the regulating entity is responding to the general command of a statute or rule.

Although it is relatively rare for a court order to require a state or local government to adopt or enforce a regulation, such orders do occur. Thus, for example, in *Loggerhead Turtle v. Volusia County*, 148 F3d 1231, 1249-53 (11<sup>th</sup> Cir 1998), a county government was required by court order to impose beachfront lighting regulations to avoid harm to an endangered species protected by the federal ESA. Where a court is applying federal or state law to require a state or local government to implement a requirement of federal law, the compulsion to the regulating entity is immediate, and we have little doubt that in such a circumstance the regulating entity is required to impose a regulation within the meaning of subsection (c) of Measure 7.

#### **d. Contracts**

Regulating entities may also be contractually obligated to implement a requirement of federal law. As a general matter, where a state agency or a local government has the authority to enter into a binding agreement and has done so pre-Measure 7 in a circumstance that requires it to adopt or enforce a regulation that implements a requirement of federal law, we believe such an agreement means that it is “required” to impose the regulation within the meaning of subsection (c). For example, we have previously concluded that an agreement between the State of Oregon, through the Director of the Department of Land Conservation and Development, and the federal Office of Coastal Zone Management of the U.S. Department of Commerce concerning the extent of oyster culture allowed in a particular area, was binding on all agencies of the state, such that the Oregon Department of Agriculture was required to enforce a regulation of another agency that implemented provisions of the federal Coastal Zone Management Act. Letter of Advice dated June 25, 1984, to C.J. Brenna, Assistant Director, Division of State Lands (OP-5644) at 3. Such agreements are not uncommon between state and federal agencies and are authorized by numerous statutes. *See, e.g.*, ORS 366.710, 374.080, 377.615 (roads and highways), ORS 390.845 (scenic waterways), ORS 448.277 (drinking water supply), and *see generally* ORS ch 190 (Intergovernmental Cooperation).

We do not believe, however, that the state, a state agency or a local government that is presented with a choice (after the effective date of Measure 7) of whether to bind itself contractually to enforce or adopt a regulation is or can be “required” to do so, at least by state or local law. As a result, while we believe that state and local governments that are contractually required to impose regulations by existing (pre-Measure 7) agreements are “required” to impose a regulation for purposes of subsection (c), they may not avoid the obligation to pay compensation by electing to bind themselves to do so after the effective date of the Measure. If the state, a state agency or a local government enters into such an agreement after the effective date of Measure 7, unless the agreement is required by federal law or by a court order, we believe it unlikely that the agreement is itself a source of authority that requires a regulating entity to pass or enforce a regulation to implement a requirement of federal law.

## 2. “Required” Scope of Regulation

We also believe that the voters intended the phrase “to the minimum extent required” to circumscribe the scope of the regulation that the regulating entity imposes.<sup>lxiv/</sup> Thus, when a regulating entity is required to impose a regulation to implement a requirement of federal law, the regulation imposed must not only be no broader in scope, in terms of its restriction on the use of private real property, than the requirement of federal law being implemented, it must also be the minimum that the regulating entity is required to impose. Because of the grammatical structure of the provision, we believe that the regulation imposed may be only the minimum required by the federal law, state or local law, court order or contract that required the regulating entity to impose the regulation.

Provisions concerning the scope of regulations adopted to implement federal law exist elsewhere and are relatively familiar. There are many federal laws that require state laws implementing them to be no less stringent than federal law to avoid preemption. These laws include particular provisions of the FWPCA, 33 USC § 1370; the Clean Air Act, 42 USC § 7416; the ESA, 16 USC 1535(f); the Federal Insecticide, Fungicide and Rodenticide Act, 7 USC § 136v(a); and the Federal Railroad Safety Act, 45 USC § 434.

Where it is state or local law that requires the implementation of requirements of federal law, it is not uncommon for the state or local law to limit the scope of the authorization expressly. For example, ORS 468A.310(2) authorizes the Environmental Quality Commission to adopt rules to implement particular provisions of the federal Clean Air Act, but

the commission and the department may take only those actions required to obtain the [federal Environmental Protection Agency] administrator’s approval and to implement the federal operating permit program and other requirements of the Clean Air Act unless the commission finds there is a scientifically defensible need for additional actions necessary to protect the public health or environment.

*See also* ORS 343.485 (authorizing rulemaking pertaining to confidentiality of certain records, but only to extent required by federal law). In essence, these laws require that state actions implementing a requirement of federal law be no more stringent in terms of the degree to which they restrict a use of property than is “required” by federal law.

The determination of the scope of the regulation that federal, state or local laws, contracts or court orders require the regulating entity to adopt will necessarily involve a case-by-case assessment of each law, contract or court order, and perhaps even of each factual situation. Where the controlling authority is specific and is adopted by the regulating entity by reference, the issue will be straightforward. Where the regulating entity has substantial discretion as to the manner and method of implementing a federal requirement, however, the determination will be difficult.

## **IX. Impact of Measure 7 on Specific State Programs**

Generally, we believe that Measure 7 will create a right to compensation for the enforcement of a significant number of existing laws including many land use and zoning laws, some aspects of building codes, hazardous waste or substance laws and other laws setting requirements for particular types of facilities such as farmworker housing, nursing homes and private schools. Also included are at least certain portions of the landlord-tenant laws, similar laws governing possession and disposition of real property and rent control laws to the extent they are allowed under ORS 91.225. In certain cases, whether a law will create a right to compensation is particularly dependent on how the exceptions in Measure 7 for nuisance laws and laws that implement federal requirements are interpreted. Laws in this category include the food safety laws, the Forest Practices Act and air pollution laws. The enforcement of some existing criminal laws also may require compensation under Measure 7, including the environmental crimes statutes at ORS 468.920 to 468.961, and certain laws relating to the cleanup of property contaminated by illegal drug manufacturing. ORS 453.990.

We have been asked specifically to assess the impact of Measure 7 on several state regulatory programs: exclusive farm use zoning, the Beach Bill and the Bottle Bill.<sup>lxv/</sup> In order to determine the impact of Measure 7 on a particular regulatory program, we first determine whether the regulation “restricts the use of private real property.” We next determine whether any of Measure 7’s exceptions apply, i.e., whether the regulations constitute adoption or enforcement of “historically and commonly recognized nuisance laws,” or whether the regulations “implement a requirement of federal law.” Finally, we consider the effective date of the regulations and how the date of acquisition of affected real property may affect the impact of Measure 7.

### **A. Exclusive Farm Use Zoning**

Exclusive farm use (EFU) zoning is one aspect of Oregon’s statewide land use planning system. The EFU statutes, the first of which went into effect in 1963, are codified at ORS 215.203 to 215.327. Under these statutes, counties are authorized to adopt zoning ordinances designating EFU zones. ORS 215.203. Some counties did not begin adopting EFU zoning ordinances until 1975 when EFU zoning changed from a discretionary program to one requiring counties to zone agricultural lands for exclusive farm use. Currently, more than half of the privately owned land in Oregon is EFU-zoned.<sup>lxvi/</sup>

Within EFU zones, land may be used only for farm uses, with exceptions for other uses only in limited circumstances. *See, e.g.*, ORS 215.283, 215.284. The statutory definition of “farm use” is the primary factor limiting how EFU-zoned lands may be used. Although the definition is complex, it essentially requires that the land be used for the primary purpose of obtaining a profit in money through agricultural or horticultural use or through animal husbandry. ORS 215.203(2)(a).

The EFU zoning laws operate at three levels. First, with regard to some aspects of land use within EFU zones, the legislature has required counties to regulate land use in a particular way. For example, in ORS 215.213(3) and 215.284, the legislature has specified conditions



under which a non-farm dwelling may be established in EFU zones. Generally, these statutes allow a non-farm dwelling only on lots or parcels created before 1993, that are lower quality soils for agricultural use, and that will not interfere with farm and forest uses in the area. *See, e.g.,* ORS 215.284. When a property owner wishes to establish a non-farm dwelling, he or she must comply with the requirements specified in the statute. In short, applicable state statutes are the first level of standards and criteria with which individual land uses must comply. *See Marquam Farms Corp. v. Multnomah County*, 147 Or App 368, 380, 936 P2d 990 (1997).

At the second level, the Oregon legislature has delegated broad authority to the Land Conservation and Development Commission (LCDC) to adopt the Statewide Land Use Planning Goals, ORS 197.225 to 197.245, and rules implementing those goals. *Lane County v. LCDC*, 325 Or 569, 581, 942 P2d 278 (1997) (upholding authority of LCDC to restrict uses on EFU-zoned lands otherwise allowed by statute). Pursuant to this authority, LCDC has adopted Goal 3 and OAR chapter 660, division 033, which require counties to preserve and maintain agricultural lands for farm use. Goal 3 simply provides that “[c]ounties may authorize \* \* \* nonfarm uses defined by commission rule that will not have significant adverse effects on accepted farm or forest practices.” LCDC’s implementing rules, however, establish additional limitations on non-farm uses, including the establishment of non-farm dwellings. OAR 660-033-0120 (and Table 1) and OAR 660-033-0130. Thus, at the state level, agricultural lands must be zoned for exclusive farm use, and the use of EFU-zoned lands for residential, commercial, industrial and other non-farm uses is closely curtailed both by statute and by rule.

In most cases, the Statewide Land Use Planning Goals and their implementing rules control what local governments must do in adopting, updating or otherwise amending comprehensive plans and land use regulations, rather than what uses owners may make of their property. ORS 197.175; *Byrd v. Stringer*, 295 Or 311, 316-317, 666 P2d 1332 (1983). A property owner normally does not have to show that a proposed use complies with LCDC goals and their implementing rules in order to obtain a county’s approval of a particular use of property. *Id.* However, in evaluating land use applications, a county is required to apply any state goal or rule provisions that the county has not implemented through the adoption of corresponding provisions in its comprehensive plans or land use regulations. ORS 197.646; *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350, *rev den* 323 Or 136, 916 P2d 311 (1996). Thus, where new or amended goal or rule provisions contain standards or criteria that relate to a proposed use, and a county has not adopted amendments to its own code to implement those provisions, the county must apply them directly in deciding whether or not a use may be approved. New or amended goal provisions that have not been implemented by a county in its own code are the second level of standards and criteria with which individual land uses may be required to comply.

The third level of standards and criteria for particular land uses within EFU zones are the comprehensive land use plans and land use regulations of counties. When a property owner seeks permission to use EFU-zoned land for a particular nonfarm purpose, he or she applies to a county. ORS 215.416. At this third level, counties retain authority under Oregon’s statewide land use planning system to adopt and enforce their own unique land use controls in areas not regulated by the state. And, as a general matter, even in areas where the state has set requirements by statute, goal or rule (as with EFU zoning), counties may adopt local regulations

that are more restrictive than state law, except for certain uses allowed under ORS 215.213(1) and 215.283(1). *R/C Pilots Association v. Marion County*, 33 Or LUBA 532, 538 (1997). *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995).

In sum, EFU zoning is a combination of controls imposed by state statutes, LCDC Goal 3 and its implementing rules, and local ordinances.

### **1. Do the Regulations Restrict the Use of Private Real Property?**

The first question we address in order to determine the effect of Measure 7 on EFU zoning is whether they are “regulation[s] that restrict[ ] the use of private real property.” All of the EFU zoning laws discussed above are within the definition of “regulation” in subsection (e) of Measure 7. Where they apply to a particular use, all of these regulations “restrict[ ] the use of private real property.” Most do so by limiting or barring the purposes for which EFU-zoned lands may be employed, as with the basic limitation in ORS 215.203(1) that EFU-zoned lands be used exclusively for farm use. In some circumstances, the statutes, rules and local ordinances also limit the physical extent to which EFU-zoned land may be used for particular purposes. For example, ORS 215.283(1)(v) allows facilities for processing of farm crops on EFU-zoned lands, but limits the size of the processing facility to 10,000 square feet. As a result, we believe these statutes, goals, rules and local ordinances are regulations that “restrict the use of private real property” within the meaning of Measure 7.

A property owner seeking to use EFU-zoned land for a particular non-farm use will need to look first to the applicable county’s land use regulations and comprehensive plan to determine what regulations govern the use, then to LCDC goals and rules to determine if there are any new or amended regulations that have not been implemented by the county (and, which therefore apply directly to the use), and finally to the state statutes in ORS chapter 215.

Measure 7 provides that compensation is due only when government “passes or enforces” a regulation that restricts the use of private real property so as to reduce its value, and that compensation is due a particular property owner only “if the regulation was adopted, first enforced, or applied after the current owner of the property became the owner.” (See discussion in Part III of this opinion.) EFU zoning already exists through a combination of statutes, rules and ordinances adopted by state and local government. Thus, in most instances, we expect a property owner will be seeking compensation for government action to “enforce” EFU zoning. This governmental action may occur in at least two principal ways.

First, in the normal course of events, a property owner will seek county authorization to build a structure or to carry out a use. In most cases, the counties authorize such uses through the issuance of a “permit,” done as part of a land use decision. *See generally* ORS 215.402 to 215.427. If a county denies a request for a permit for a use on EFU-zoned lands, we believe it “enforces” a regulation that restricts the use of real property, whether the basis for the denial is state statute, LCDC goal or rule or a county ordinance.

In Part III F of this opinion, we conclude that if a regulation requires the property owner to apply to the government for authorization for the desired use of property, the owner may

obtain compensation under Measure 7 at any time for the effect on the property's value of having to seek governmental authorization. We also conclude that if a regulation, on its face, limits or prohibits a use, the property owner may seek compensation for the limitation or prohibition without having to complete any application process related to the desired use. And we conclude that a regulation that provides that a use may be allowed (or limited or prohibited) generally will require the property owner to complete whatever review process the government provides for in order to determine whether there is, in fact, a restriction.

We believe that many, but not all, of the provisions of ORS 215.203 to 215.327, Statewide Planning Goal 3 and the Goal 3 implementing rules at OAR chapter 660, division 033, and local ordinances that implement the statutes and rules, are regulations that on their face restrict the use of real property. It is true that a property owner may seek to change the zoning designation of his or her property from EFU to another classification that allows a desired use by requesting an exception to Goal 3 under ORS 197.732 and LCDC Goal 2.<sup>lxvii/</sup> However, we conclude in Part III F of this opinion that Measure 7, by granting a right to compensation for *any* restriction on use, effectively eliminates the ripeness doctrine under Article I, section 18, of the Oregon Constitution except in instances where a regulation provides on its face that a use *may* be restricted. With one major exception, the EFU statutes, rules and ordinances unambiguously and unconditionally prohibit, limit or restrict particular uses of property on EFU-zoned lands. As a result, we believe compensation will be required in most cases, without the necessity of applying to a county for approval of a particular use or to rezone the property. The major exception is the set of uses that counties *may* allow on EFU-zoned lands under ORS 215.213(2) and 215.283(2).

The Oregon Supreme Court has contrasted the uses allowed under ORS 215.213(1) and 215.283(1) with the uses allowed under ORS 215.213(2) and 215.283(2). According to the court, the so-called subsection (1) uses in 215.213 and 215.283 are uses that are allowed “as of right \* \* \* that a local governing body may not prevent.” *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). “On the other hand, subsection (2) uses [are] ‘conditional uses’ that [are] ‘subject to the approval of the governing board of the county.’” *Id.* In short, ORS 215.213(2) and 215.283(2) provide that certain nonfarm uses may be established on lands zoned EFU if approved by the county. If a property owner wishes to use his or her property for one of the uses that a county may allow under ORS 215.213(2) or 215.283(2), the only way to determine whether or not the government has enforced a regulation that restricts the use of real property will be for the property owner to complete the permit process. Only by doing so can it be known whether the use is allowed, allowed with conditions (ORS 215.296), or prohibited.

A second way in which EFU zoning may be “enforced” is if a county's approval of a use of property in an EFU zone is appealed, and there is a subsequent denial or other restriction on the use as a result of the appeal. In Part III B of this opinion, we conclude that a third-party action to require compliance with a regulation is not sufficient by itself to trigger the right to compensation under subsection (a) of Measure 7. While a third party's appeal of a county's land use approval would not, itself, constitute *government* enforcement of a regulation, if the county is required to deny, condition or otherwise restrict the use as a result of an appeal, the county's compliance would be enforcement of a regulation.

Under ORS 197.830, any person who appeared before the county in its proceedings leading up to the approval, may appeal that decision by filing a notice of intent to appeal within 21 days of the county's decision with the Land Use Board of Appeals (LUBA). LUBA may remand or reverse the county's decision, effectively requiring the county to conduct further proceedings regarding the proposed use and, in some cases, requiring the county to deny, limit or otherwise condition the use. *See generally* ORS 197.835. If a county refuses to act in response to a LUBA order, a plaintiff would most likely have the right to force the county to act under ORS 197.825(3).

Where a county has approved a use on EFU land, and that approval is appealed to LUBA, the property owner is not prevented from commencing the use during the pendency of the appeal unless a stay is entered. ORS 197.845. Thus, in the normal case, where a county has approved a use of EFU land and that approval is appealed, the government will not have "enforced" the regulation until and unless LUBA reverses or remands the county's decision, and the county in response to the LUBA order denies, limits, or otherwise conditions the use pursuant to LUBA order, either voluntarily or as a result of an enforcement action under ORS 197.825(3).

In summary, we believe that most of the state statutes, LCDC rules and local ordinances that govern the use of EFU-zoned land are regulations that restrict the use of real property within the meaning of Measure 7. With the exception of the uses that *may* be allowed on such lands under ORS 215.213(2) and ORS 215.213(2), such regulations clearly limit or restrict the use of property, and a property owner need not complete any application process related to the desired use before seeking compensation under Measure 7 if he or she wishes to carry out a use that is restricted in some manner by the regulations. Where the regulations provide that a use *may* be allowed, and the county approves the use, the county may nevertheless be required to deny or restrict the use if the county's decision is appealed and LUBA reverses or remands it.

## **2. Application of Exceptions**

Regulations that restrict the use of private real property may nonetheless come within one of the exceptions in Measure 7 to the obligation to compensate property owners. Only two of these exceptions are potentially relevant to EFU zoning – nuisance laws and requirements of federal law. (These exceptions are generally discussed in Parts VII and VIII of this opinion, respectively.)

### **a. "Nuisance Laws" Exception**

Under subsection (b) of Measure 7, the "adoption or enforcement of historically and commonly recognized nuisance laws" does not require the payment of compensation. We believe that the exclusive farm use zoning laws are not historically and commonly recognized nuisance laws, as that term is used in Measure 7, and that therefore this exception does not apply.

The primary purpose of EFU zoning is to promote the continued agricultural use of lands suited for such use. *See* ORS 215.243. Thus, while EFU zoning operates to limit interference with farm uses by non-farm uses, *see, e.g.*, ORS 215.296, its main function is to promote a particular form of economic activity – agricultural use – rather than to protect public health,

safety or morals. As an example, ORS 215.253 generally prohibits state or local government from restricting farm structures or practices, except to protect public health, safety or welfare. And the right-to-farm laws at ORS 30.933 to 30.937 generally prohibit both government and private persons from bringing nuisance actions against accepted farm practices. The combination of these laws clearly shows that EFU zoning operates to promote agricultural use and to discourage non-farm uses that interfere with agricultural use, even to the point of prohibiting common law nuisance claims that would otherwise limit farm uses that injure or harm other uses of private property. As a result, we believe that EFU zoning regulations are not historically and commonly recognized nuisance laws under subsection (b) of Measure 7.

**b. “Requirement of Federal Law” Exception**

Under subsection (c) of Measure 7, a “regulating entity may impose, to the minimum extent required, a regulation to implement a requirement of federal law” without the payment of just compensation. In Part VIII of this opinion, we conclude that this exception encompasses state and local regulations that give practical effect to something that federal law calls for or demands. We are aware of only two federal laws that call for or demand the protection of agricultural lands for agricultural uses.

The first is the federal Farmland Protection Policy Act, 7 USC §§ 4201 to 4209. This law requires *federal* agencies to evaluate the effect of their actions on the conversion of farmland to non-farm uses and to “assure that \* \* \* Federal programs, to the extent practicable, are compatible with State, unit of local government, and private programs and policies to protect farmland.” 7 USC § 4202(b). Nothing in the federal Act or any provisions of state or local law requires state or local government to impose the requirements of this Act. As a result, we conclude that this law does not provide a basis for an exception to the requirements of Measure 7.

The second is the federal Coastal Zone Management Act (CZMA), 16 USC §§ 1451 *et seq.*, discussed more fully below in Part IX B of this opinion. The CZMA requires private property owners who must obtain a federal license or permit to certify that the use authorized will be consistent with the state's approved coastal management program. 16 USC § 1456(c)(3). Oregon's approved coastal management program includes most provisions of ORS chapters 197 and 215, most LCDC goals and rules, including Goal 3, and most provisions of local comprehensive plans. Oregon Coastal Management Program at 4.<sup>lxviii/</sup> The CZMA also requires any federal agency taking an action, or funding a state or local government action, in the coastal zone or affecting the coastal zone, to certify that the action is consistent with the state coastal management program. 16 USC § 1456(c)(1). As a result, if a private property owner is allowing a federal, state or local government to use his or her property, the CZMA may apply to that use.

For the same reasons that we conclude, below, that state and local enforcement of regulations where a consistency determination is required under the CZMA are most likely excepted under subsection (c) of Measure 7 in the context of the Beach Bill, we conclude that the imposition of EFU zoning in the coastal zone in conjunction with a CZMA consistency determination also is likely to be excepted.<sup>lxix/</sup> Again, however, the exception is most likely a narrow one that applies only when the use of private property requires a federal permit or

license, or involves an action of a federal agency, or federal funding of the action of a state or local government. Private uses in the coastal zone that are regulated by EFU zoning, but that do not require a federal permit or license, will *not* come within the exception in subsection (c) of the Measure for the reason that the EFU zoning in that context is not implementing a requirement of the CZMA.

### **3. Effective Date of the Regulations**

EFU zoning stems from legislative attempts to control the conversion of agricultural land to non-farm uses. In 1963, the legislature first authorized exclusive farm use zoning. Or Laws 1963, ch 577. And in 1975, pursuant to Oregon Laws 1973, chapter 80 (Senate Bill 100), LCDC adopted Statewide Planning Goal 3. As noted above, Goal 3 altered EFU zoning from a discretionary program to one where counties were required to zone agricultural lands for exclusive farm use. In 1993, Goal 3 and LCDC's implementing rules for Goal 3 underwent significant revisions relating to high-value farmland and the circumstances under which dwellings are allowed, but the fundamental regulatory restrictions concerning EFU lands have been in place since 1975.

As a result of the significant number of amendments to ORS chapter 215, Goal 3, the Goal 3 implementing rules and county ordinances, it will not be a simple exercise to determine in each instance what regulations were adopted and enforced before a particular current owner of private real property became the owner of that property.<sup>lxx/</sup> As a general matter, however, the rights of owners who acquired their property after 1975 to compensation under Measure 7 are likely to be limited, and in many cases more recent owners will have no right to compensation as a result of their having become owners after the basic EFU regulations were adopted, first enforced or applied.

One effect of Measure 7's making compensation dependent on when an owner of property became the owner, in relation to when a regulation was adopted, first enforced or applied, is that properties subject to a right to compensation will be scattered across the landscape with no particular pattern. Due to the fact that owners of EFU lands can have their property rezoned if they can demonstrate that existing patterns of development on surrounding lands make continued farm use impracticable, *see generally* OAR 660-004-0028, counties that elect to "not apply" EFU zoning may also effectively convert other farm lands to non-farm uses. As a result, the geographic extent of the effects of Measure 7 may be more widespread than its initial, direct effects where counties do not enforce EFU zoning.

#### **B. The "Beach Bill"**

What Oregonians popularly refer to as the "Beach Bill" is Oregon Laws 1967, chapter 601 (HB 1601), which is now codified at ORS 390.605 to 390.770. The bill declared the state's policy to always preserve and maintain its jurisdiction over the ocean beaches for the public's use.<sup>lxxi/</sup> Or Laws 1967, ch 601, § 1. The bill codified all previously existing public rights to enjoy dry-sand beaches. *Id.* § 2. *See Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969) (public has had long-standing customary right to use dry-sand area for recreational purposes). The Beach Bill further declared that the public interest in such lands requires the state "to do

whatever is necessary to preserve and protect scenic and recreational use of Oregon’s seashore and ocean beaches.” Or Laws 1967, ch 601, § 2(3).

The Beach Bill also authorized the State Highway Commission to police, protect and maintain the beach and to regulate its use. *Id.* § 7. Any improvement or alteration to the ocean shore seaward from the 16-foot elevation line, both construction and removal or fill, required a permit from the state highway engineer. *Id.* §§ 5, 6.

In 1969, the legislature amended the Beach Bill by replacing the 16-foot elevation line with the statutory vegetation line identified in ORS 390.770.<sup>lxxii/</sup> This line was used to “establish and describe” the line of vegetation that demarcates the landward boundary of the “ocean shores,” as well as the landward boundary of the area where the state must “do whatever is necessary to preserve and protect scenic and recreational use.” Or Laws 1969, ch 601, §§ 2, 4. The amendments specifically noted the necessity “to control and regulate improvements on the ocean shore” and refined the regulatory permit program for “improvements.” *Id.* § 7. The State Highway Commission was directed to promulgate rules governing public use of the ocean shore, and the Commission’s authority to restrict motor vehicle travel and aircraft landing in the ocean shore was broadened.<sup>lxxiii/</sup> *Id.* §§ 16, 18. The amendments also gave the State Highway Commission the authority to regulate pipeline, cable or other conduit in the state recreation area and to regulate the removal of archeological or paleontological objects and natural product other than fish and wildlife from the ocean shore. *Id.* §§ 20-26.

The State Parks and Recreation Department (Parks) is the successor to the Highway Commission with respect to the duties, functions and powers vested in that agency by the Beach Bill.<sup>lxxiv/</sup> Since 1969, Parks or its predecessor has regulated the ocean shore to implement the statutory mandates of the Beach Bill. OAR 736-020-0001. Parks’ rules provide procedures and standards for permits to make improvements on the ocean shore, construct pipelines, cables or conduits across the ocean shore, or to remove products along the ocean shore. A permit is required for any of these activities if they occur within the “ocean shore,” defined to mean the “land lying between the extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the line of established upland shore vegetation, whichever is further inland.” ORS 390.605(2); OAR 736-020-0002(13). The rules provide general standards for an ocean shore permit. OAR 736-020-0010. The standards include compliance with LCDC Goals, including Statewide Planning Goal 18, which limits consideration of permit applications for beachfront protective structures on the ocean shore to instances where development existed on January 1, 1977. OAR 736-020-0010(6). Projects are required to be consistent with acknowledged comprehensive plans. The rules require consideration of scenic standards, OAR 736-020-0015; recreation use standards, OAR 736-020-0020; safety standards, OAR 736-020-0025; and natural and cultural resource standards, OAR 736-020-0030.

## **1. Do the Regulations Restrict the Use of Private Real Property?**

The first question we address in order to determine the effect of Measure 7 on the Beach Bill is whether the regulations “restrict[ ] the use of private real property.” To answer this question with respect to beach regulation, it is necessary to consider the nature of public and private rights in beachfront property under Oregon law.

In *Thornton v. Hay*, the Oregon Supreme Court considered public and private rights on the “dry-sand area” of the beach, which the court described as the land lying between the line of mean high tide and the vegetation line. 254 Or at 586. The court determined that the state could enjoin owners of beachfront property from constructing fences enclosing the dry-sand area, even though their record title included that area. The court reasoned that, under the English doctrine of custom, the public had acquired a right to use the dry-sand area for recreational purposes, and the private owner could not exclude the public from use of that area.

The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state’s political history. \* \* \* [F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.

254 Or at 588. Thus, while the state generally owned the foreshore, and the record title holder owned the uplands, neither the state nor the record-title holder could be said to “‘own’ the full bundle of rights normally connoted by the term ‘estate in fee simple.’” *Id.* at 591-92. Application of the doctrine of custom to the dry-sand area, said the court, “takes from no man anything which he has had a legitimate reason to regard as exclusively his.”<sup>lxxxv</sup> *Id.* at 599.

The Oregon Supreme Court reaffirmed this view in a case concerning a “taking” claim by beachfront property owners under both Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. *Stevens v. City of Cannon Beach*, 317 Or 131, 854 P2d 449 (1993), *cert denied* 510 US 1207, 114 S Ct 1332, 127 L Ed2d 679 (1994). The property owners in *Stevens* asserted that their property had been “taken” by various permit denials that prevented them from constructing a seawall on the dry-sand area of the beach. The court considered the holding of *Thornton* in light of the United States Supreme Court’s then-recent opinion in *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed2d 798 (1992). In *Lucas*, the United States Supreme Court addressed South Carolina’s Beachfront Management Act which prohibited Lucas from building a structure on his land, making the land valueless. The Court found a taking, explaining that the government could not limit the use of land in a way that deprived the owner of all economically beneficial use of land, unless the limitation inhered “in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” 120 L Ed2d at 821.

In *Stevens*, the Oregon Supreme Court rejected the property owners’ claim that their property had been taken under the standard established in *Lucas*. The court explained that its decision in *Thornton* had not announced a new rule regarding property rights, but rather had recognized a preexisting public right, thus enunciating one of Oregon’s “background principles of \* \* \* the law of property.” 317 Or at 143. Accordingly, the Stevens had never had the



property interests they claimed were taken. *Id.* See also *Hay v. Bruno*, 344 F Supp 286, 289 (D Or 1972) (*Thornton* did not make a sudden retroactive change in the law effecting a taking).

These decisions establish that (1) the public has the right to recreational use of the dry-sand area, (2) an upland property owner's property interests do not include the right to interfere with that public use, and (3) therefore, any government regulation that prevents private property owners from interfering with that public use is not a "taking" of private property.

Measure 7 applies to regulations that "restrict[ ] the use of private real property." In light of the above principles derived from *Thornton* and its progeny, we conclude that to some extent Beach Bill regulations restrict uses that are not part of the upland owner's property interests and therefore do not restrict the use of private real property, while to some extent Beach Bill regulations do restrict uses of private real property.

**a. Beach Bill Regulations That Do Not Restrict the Use of Private Real Property**

To the extent that the Beach Bill and implementing regulations restrict uses that could not be exercised without infringing on property rights that belong to the public under *Thornton v. Hay*, those regulations are not restrictions on the use of private real property, and Measure 7 does not apply. For example, ORS 390.640 requires a permit for any "improvement," as defined in ORS 390.605(1), within the ocean shore. Requiring a permit for the construction of a fence, wall or any other structure that blocks or otherwise interferes with public recreational use of the ocean shore does not restrict a use of private property to which the owner has a right. Additionally, the safety standards adopted under the Beach Bill provide that any improvements "shall minimize obstructions to pedestrians or vehicles going onto or along the ocean shore area." OAR 736-020-0025. If a permit to build a boardwalk were denied on the ground that it failed this standard, Measure 7 would not be implicated.

**b. Beach Bill Regulations That Restrict the Use of Private Real Property.**

The Beach Bill and its implementing regulations could "restrict the use of private property" in two ways: (1) if the regulations apply to the part of the dry-sand area the title of which is privately held, but restrict uses that are not inconsistent with the public right of recreational use, and (2) if the regulations apply to property above the line of actual vegetation established as the geographic limit of the public recreational right articulated in *Thornton*.<sup>lxxvi/</sup>

**(1) Regulation on Dry-Sand Area**

The Beach Bill regulations may restrict the use of private real property, even if the restrictions apply to the dry-sand area of the beach, if those regulations restrict uses that are not inconsistent with the public use of the dry-sand area for recreational purposes recognized in *Thornton*. For instance, one of Parks' regulations governs the placement of pipelines under the ocean shore. OAR 736-020-0040. Once completed, such placement at least arguably would not interfere with public recreational use. Similarly, the prohibitions on the removal of archeological

objects without a permit may not necessarily flow from the public's rights under the doctrine of custom. OAR 736-020-0030. Each such regulation would need to be examined to determine whether the use it restricts interferes with the public right to recreational use.<sup>lxxvii/</sup> If the regulation restricts a use that is not inconsistent with the public right, Measure 7 could apply to that regulation.

## (2) Regulation Landward of Dry-Sand Area

The Beach Bill prohibits development without a permit on the “ocean shore” in the area between the extreme low tide to the surveyed “line of vegetation.” ORS 390.770. The public's right to recreation use described in *Thornton* extends only to the actual vegetation line.

The Beach Bill's “surveyed line of vegetation” does not necessarily coincide with the “actual” line of vegetation. In some places, the surveyed line will lie seaward of the actual vegetation line; in some places it will extend landward of the actual vegetation line. Because the public right recognized in *Thornton* is based on actual historical use of the “dry-sand area” described in the case, the rationale of the case does not extend public rights beyond the actual line of vegetation. To the extent the state regulates activities on privately owned property seaward of the *surveyed* vegetation line, but landward of the *actual* vegetation line, it may be regulating the use of private property beyond the geographic extent of the public rights established under the doctrine of custom. See *State Highway Comm. v. Bauman*, 16 Or App 275, 517 P2d 1202 (1974) (not extending the public right beyond “vegetation line”); *McDonald v. Halvorson*, 92 Or App 478, 487 n 9, 760 P2d 263 (1988), *rev'd on other grounds* 308 Or 340, 780 P2d 714 (1989) (surveyed line of vegetation does not define the public recreational easement arising out of doctrine of custom). Although we do not know the exact extent of such lands, we are informed by Department of Land Conservation and Development staff of several areas where there are such lands.<sup>lxxviii/</sup> Measure 7 could apply to Beach Bill regulations that restrict the use of such property.

## 2. Applicability of Exceptions

Regulations of property subject to Measure 7 may nonetheless fall into one of the Measure's exceptions. Only two of these exceptions are potentially relevant to the Beach Bill: nuisance and requirements of federal law. (These exceptions are generally discussed in Parts VII and VIII of this opinion, respectively.)

### a. “Nuisance Laws” Exception

Subsection (b) of Measure 7 excepts the “adoption and enforcement of historically and commonly recognized nuisance laws.” This exception is to be “narrowly construed in favor of a finding that just compensation is required.”

In 1999, the Beach Bill was amended to provide that any improvement within the ocean shore without a permit, or contrary to permit conditions, is a “public nuisance.” ORS 390.661; Or Laws 1999, ch 373, § 12. We have found nothing in the legislative history as to whether the legislature understood there to be any historical basis for this declaration. Because this

legislative declaration is so recent, the declaration itself – without more – does not demonstrate a substantial body of prior law reaching back a substantial period. It is therefore unlikely that the declaration itself would establish that the Beach Bill prohibitions represent “commonly and historically recognized nuisance laws” within the meaning of Measure 7.

Whether any particular provision of the Beach Bill or its implementing regulations comes within the nuisance exception would need to be determined by analyzing whether that particular regulation addresses an activity that has “historically and commonly” been recognized as a “nuisance” in the ocean shore area. Such an inquiry is beyond the scope of this opinion.

**b. “Requirement of Federal Law” Exception**

Under subsection (c) of Measure 7, a “regulating entity may impose, to the minimum extent required, a regulation to implement a requirement of federal law” without the payment of just compensation. The primary federal law that might be characterized as being implemented by the Oregon Beach Bill is the federal Coastal Zone Management Act (CZMA), 16 USC §§ 1451 *et seq.*

The CZMA does several things. First, it establishes broad national objectives for management of land and water resources in the coastal areas of the nation. Second, it requires coastal states that have completed development of coastal management programs (programs that guide the use of land and water in the coastal zone) to submit those programs to the federal Secretary of Commerce for review and approval. 16 USC § 1454. The state program must contain enforceable authorities to control the use of land and water, to ensure compliance with the management program, and to resolve conflicts among competing uses. 16 USC § 1455(10). Once the state’s coastal program is approved, the CZMA requires federal actions affecting the coastal zone to be consistent with state coastal management programs to the maximum extent practicable. 16 USC § 1456(c)(1). In addition, private actions that require a federal license or permit, and state and local activities that receive funding from the federal government, also must be consistent with the coastal program. 16 USC § 1456(c)(3)(A), (d). Finally, once it is approved, the state’s coastal program may not be amended or modified without the approval of the Secretary of Commerce. 16 USC § 1455(e).

Some portions of the Oregon Beach Bill and its implementing regulations are included in Oregon’s approved coastal management program. Oregon Coastal Management Program (OCMP) at 17 and Table 3 at 23.<sup>lxxix/</sup> As a result, the CZMA requires that private activities requiring a federal license or permit, federal activities (on private land), and state or local actions that receive federal funding must be consistent with those provisions of the Beach Bill.

Although Oregon’s original decision to submit a coastal program to the federal government in return for funding and authority over certain federal activities and decisions may have been voluntary, the CZMA on its face now obliges the state to maintain that program. 16 USC § 1455(e). Consequently, we believe that the portions of the Beach Bill and its implementing regulations that are part of Oregon’s approved coastal management program are “regulation[s] to implement a requirement of federal law” within the meaning of subsection (c)

of Measure 7, at least where federal activity, permits or licenses, or funding to state or local government is involved in a particular use of private real property.

The fact that portions of the Beach Bill implement the CZMA does not necessarily mean that the regulations have been “impose[d] to the minimum extent required” within the meaning of the exception in subsection (c) of the Measure. Although the CZMA contains broad, general objectives and standards for state coastal programs, the federal statute does not directly require state regulation to protect public recreational use of the dry sand area of the beach. However, the implementing federal regulations for the CZMA do provide that “[t]he management program must contain a definition of the term ‘beach’ that is the broadest definition allowable under state law or constitutional provisions, and an identification of public areas meeting that definition.” 15 CFR § 923.24(d). Oregon has done so for purposes of the Beach Bill and the CZMA, defining the “ocean shore” as the land between extreme low tide and the statutory vegetation line or the line of established vegetation, whichever is farther inland. ORS 390.605. Thus, at least in terms of its spatial scope, the geographic extent of the Beach Bill appears to be within the bounds of the minimum extent required by federal law.

It is more difficult to determine whether the restrictions on use imposed by the Beach Bill exceed the minimum extent required by federal law, state or local law, court order or contract as a matter of their substantive or restrictive effect for purposes of subsection (c) of Measure 7. The CZMA (except with respect to water quality) generally does not mandate particular levels of regulation. Rather, it requires the coastal states to go through a planning process and then, based on the results of that process, establish what resources and areas need to be protected and at what level. With respect to beaches, the federal implementing rules for the CZMA require identification of public beaches with recreational value, a process for determining the level of protection for such areas that is appropriate, and enforceable policies that carry that level of protection into effect. 15 CFR § 923.24.

If the sole requirements of the CZMA were procedural ones, we would not conclude that it sets any particular scope of regulations that has been “impose[d] to the minimum extent required.” However, as noted above, under the CZMA the state cannot change the current coastal program and the regulations it contains (including the Beach Bill) without federal approval. 16 USC § 1455(e). Based largely on the fact that federal law, on its face, requires the state to maintain its coastal program, we believe that the CZMA itself requires the state to “impose” these regulations in their current form within the meaning of Measure 7, but this conclusion is not free from doubt.

In terms of other sources of law that require Oregon to impose provisions of the Beach Bill in order to implement federal law, we do not believe that the provisions of the Beach Bill itself are a source of such a requirement. As noted above, the Beach Bill was adopted initially in 1967. This predated the passage of the CZMA, which occurred in 1972. ORS 196.435 identifies the Department of Land Conservation and Development as the primary agency for purposes of carrying out the CZMA, but does not require that particular regulations be included in the state’s coastal management program in order to implement the CZMA. There may be such provisions in local laws, but an examination of them is beyond the scope of this opinion. Finally, we are not aware of any court orders that require the state to impose provisions of the Beach Bill in order to

carry out the CZMA. There may be agreements between the state and the federal government that relate to what the state must do to maintain its coastal management program but, again, examining any particular agreement is beyond the scope of this opinion. In sum, the only law that we are aware of that requires the state to impose the provisions of the Beach Bill in order to carry out the CZMA are the terms of the CZMA itself.

We stress here that the reach of the exception in this setting is very narrow. First, the exception comes into play only to the extent the Beach Bill restricts the use of private property beyond the geographic or substantive extent of the doctrine of custom, as described above. Second, the Beach Bill implements the CZMA only where a use of private property involves a federal license or permit, a federal action, or federal funding of a state or local government action. In other words, private uses that do not have a federal nexus may be regulated under the Beach Bill, but they are not regulated under the Beach Bill as it implements the CZMA. Where regulated private uses do not have a federal nexus, the exception in subsection (c) of Measure 7 would not apply.

An example of a Beach Bill regulation to which this exception could apply in certain circumstances is ORS 390.715, which requires a permit for pipelines across and under the ocean shore. Such a pipeline could be placed across an area of the beach where the public did not have a right to recreational use or placed in a way consistent with that right. Because the CZMA requires that private activities requiring a federal permit be consistent with the state's approved coastal management program, if a permit for dredged or fill material were required under the federal Clean Water Act, 33 USC § 1344, the Beach Bill regulation requiring a permit for pipelines, which is included in Oregon's coastal management program, *see* OCMP at 32, could come within the exception in subsection (c) of the Measure.

### **3. Effective Date of the Beach Bill**

Lastly, in assessing the effect of Measure 7 on the Beach Bill, we note that the Beach Bill was first enacted over thirty-three years ago, in 1967. To the extent that a Beach Bill regulation restricts the use of private real property, and does not come within one of Measure 7's exceptions, those property owners who acquired their property before the Beach Bill regulation was "first enforced or applied" within the meaning of subsection (d) of Measure 7 may have a right to "just compensation." See Part III of this opinion for a discussion of the "first enforced or applied" provision of subsection (d) of Measure 7.

A property owner is only entitled to just compensation if the regulation "continues to apply" to the property 90 days after the owner applies for compensation under Measure 7. See Part III E and Part VI of this opinion for a general discussion of this provision and the authority of state agencies to forego enforcement of regulations. With respect to the Beach Bill regulations, specifically, we note that the legislature has declared that no portion of the ocean shore between ordinary high tide and extreme low tide and no portion of the lands described in ORS 390.610 "or any interest either therein now or hereafter acquired by the State of Oregon or any political subdivision" may be alienated except as expressly provided by state law. ORS 390.615, 390.620(1). These provisions may prohibit the state or political subdivisions from

declining to enforce Beach Bill regulations where such action could be considered alienating “an interest” in lands subject to ORS 390.610.

In general, only owners who acquired their property before 1967 could have a right to compensation under Measure 7.

### **C. The Bottle Bill**

What is popularly referred to as the “Bottle Bill” first went into effect in 1972 and is now codified at ORS 459A.700 to 459A.740 and 459.992(3) and (4). The bill created the system in Oregon whereby consumers pay a deposit on containers for carbonated beverages and may return the empty containers for refund of the deposit. The primary purpose of the Bottle Bill is to reduce litter and solid waste in Oregon and to reduce injuries to people and animals from discarded “pull tops.” See generally *American Can v. OLCC*, 15 Or App 618, 623-24, 517 P2d 691 (1973); *The Oregon Bottle Bill*, 54 OR L REV 175 (1975). A secondary purpose of the Act was to encourage recycling and thus reduce energy use and solid waste. *Id.* Dealers and distributors of carbonated beverages are required to accept empty containers and to pay the refund value of the container. ORS 459A.710.<sup>lxxx/</sup> The statutes establish a required refund value, prohibit dealers and distributors from refusing empty containers, and specify beverage container requirements, including prohibiting detachable “pull-tab” openings. ORS 459A.705, 459A.710, 459A.720.

The Oregon Liquor Control Commission (OLCC) and the State Department of Agriculture (Agriculture) share enforcement of the Bottle Bill. The OLCC issues liquor licenses under ORS chapter 471; Agriculture issues licenses under ORS chapter 635 to persons engaged in the “business of a nonalcoholic beverage manufacturer,” which includes persons who distribute or sell carbonated beverages. ORS 635.015(2), 635.027. The agencies are authorized to revoke or suspend any license issued under ORS chapter 471 or chapter 635 for violation of ORS 459A.705, 459A.710 or 459A.720. ORS 459.992.

#### **1. Do the Regulations Restrict the Use of Private Real Property?**

The first question in determining the effect of Measure 7 on the Bottle Bill is whether the regulations “restrict[ ] the use of private real property.”

Regulation under the Bottle Bill is focused on the actions of the licensee rather than expressly on any real property associated with the license. Although the Bottle Bill regulations require dealers and distributors to accept empty containers, they do not specify the manner in which empty containers shall be kept or the amount of space necessary for keeping empty containers. Nevertheless, in order to comply with that requirement, dealers and distributors generally must use part of their property to make space for the empty containers. To the extent that dealers and distributors must set aside part of their private real property for empty containers, the Bottle Bill regulations restrict their use of that portion of their property for other purposes. Consequently, the Bottle Bill regulations come within the third category of regulations restricting the use of private real property that we describe in Part II B 2 of this opinion, i.e., regulations that limit or govern the physical extent to which property may be employed.

## **2. Application of Exceptions**

### **a. “Nuisance Laws” Exception**

Subsection (b) of Measure 7 excepts the “adoption and enforcement of historically and commonly recognized nuisance laws.” As noted above, the primary purpose of the Bottle Bill is to reduce litter and solid waste, and to reduce injuries to people and animals from discarded “pull tops.” While in a general sense the Bottle Bill could be characterized as a law that operates to prevent harm or injury to the public health, the function of the law to promote recycling is more likely to be characterized as typifying general welfare legislation rather than a nuisance law. In addition, given its relative recent origins, we believe the Bottle Bill is unlikely to be viewed by the courts as an historically recognized nuisance law, particularly as that phrase must be narrowly construed. We are aware of no other commonly and historically recognized nuisance laws that govern the same use, i.e., the sale and required acceptance of returns of beverage containers, and that predate the Bottle Bill.

The other primary function of the Bottle Bill is to reduce littering. Under Oregon law, interference with aesthetics, e.g., littering, does not appear to be clearly established as a common law nuisance, *see Hay v. Stevens*, 271 Or 16, 20, 530 P2d 37 (1975) (assuming, without deciding, that interference with visual aesthetic sensibilities can constitute private nuisance and noting contrary authority). In any event, because the litter caused by non-returnable bottles is not caused directly by the owner of the property from which the bottles are sold, any application of nuisance law is attenuated. We are not aware of any historical enactments prohibiting litter that also require commercial establishments to engage in certain conduct to control litter generally.

Given the relatively indirect relation between the requirement of the Bottle Bill that dealers and distributors accept returns of beverage containers and public health, and the more apparent functions of the legislation to increase recycling and reduce litter, combined with the lack of any directly relevant prior laws governing the same type of use, we believe that it is unlikely that a court would find that the Bottle Bill is a nuisance law.

### **b. “Requirement of Federal Law” Exception**

Subsection (c) of the Measure excepts regulations that “implement a requirement of federal law.” Because the Bottle Bill arises purely from state law, the exception for regulations implementing a requirement of federal law does not apply.

## **3. Effective Date of the Bottle Bill**

The Bottle Bill regulations can only give rise to compensation for dealers and distributors who acquired their property before 1972, the effective date of the Bottle Bill.

## **X. Indemnification of Local Governments**

Lastly, we are asked whether the state is required generally to provide funds to local governments for compensation that those governments must pay to property owners under Measure 7 and, specifically, whether the state must provide funds when local government must pay compensation because of a restriction on the use of private real property that state law requires local governments to impose.

Measure 7 does not itself require the state to provide funds to local governments for the compensation that those governments must pay to property owners as a result of valid Measure 7 claims. Therefore, we look to existing law to determine whether the state has such an obligation.

Article XI, section 15, of the Oregon Constitution requires the state to appropriate and allocate money to local governments when “the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program” on or after January 1, 1997.<sup>lxxxii/</sup> Or Const Art XI, § 15(1). This constitutional obligation to fund state-mandated programs applies only to “programs” that are “imposed by enactment of the Legislative Assembly or by rule or order of a state agency.” Art XI, § 15(2)(c).

There is nothing in the text of Article I, section 15 that requires the state to provide money to local governments for mandates imposed on those governments by a constitutional amendment approved by the people through the initiative process. To the contrary, there is an express exception from Article I, section 15 for “legislation” enacted or approved by the people through the initiative or referendum process. Or Const Art XI, § 15(7)(f). Although this exception might permit an inference that the people intended Article I, section 15 to apply to constitutional amendments approved by the people through the initiative process, such a conclusion would require rewriting the actual text of section 15. *See* Art XI, § 15(1) (requiring state to appropriate money when “Legislative Assembly” or “state agency” imposes “program”); §15(2)(c) (defining “program” as program or project imposed by enactment of “Legislative Assembly or by rule or order of state agency”<sup>lxxxii/</sup>); *see also* §15(6) (prohibiting “Legislative Assembly” from enacting laws reducing revenues to be derived from taxes and distributed to local governments except on three-fifths approval); §15(11) (allowing “Legislative Assembly” to identify and direct imposition of a fee to cover costs of program in lieu of appropriation of funds). Because the duty to pay compensation under Measure 7 is imposed by a constitutional amendment approved by the people – and not by an enactment of the legislature or a rule or order of a state agency – Measure 7 is not itself a state-mandated program for which the state must appropriate and allocate money to local government under Article XI, section 15.

An analysis of whether any particular state statute that requires local governments to impose a restriction on the use of private real property is itself subject to Article XI, section 15, is beyond the scope of this opinion. We do note, however, that such a statute could be subject to Article XI, section 15, only if, on or after January 1, 1997, it requires a local government to establish a new “program” or provide an increased level of service for an existing “program,” as defined in Article XI, section 15(2)(c). If a state statute requiring a local government to impose a restriction on the use of private real property were such a mandate and otherwise subject to



Article XI, section 15, it is likely that the costs incurred by local governments in compensating property owners under Measure 7 due to that state-mandated restriction would be the kind of costs the state would be required to appropriate and allocate to local governments. Article XI, section 15(1) requires the state to pay the “ongoing, usual and reasonable costs” incurred by local governments in performing the mandated activity. The phrase “ongoing, usual and reasonable costs” is defined as the “costs incurred by the affected local governments for a specific program using generally accepted methods of service delivery and administrative practice.” Art XI, § 15(2)(d). Costs incurred by local governments in compensating property owners under Measure 7 due to a post-1996 state-mandated “program” would appear to meet that definition.

Aside from Article XI, section 15, we are not aware of any constitutional or statutory provisions that would affirmatively obligate the state to reimburse or indemnify local governments for compensation that they pay under Measure 7. The state is immune from liability unless it expressly waives that immunity. *Hale v. Port of Portland*, 308 Or 508, 514, 783 P2d 506 (1989) (“the state may not be sued without its consent”). Outside the context of a tort claim, the state has not authorized an action by a local government against the state for reimbursement or indemnification. See ORS 30.285(1) (authorizing indemnification when, acting as an agent of the state, a political subdivision is held liable on a tort claim); *Oregon State Police Officers’ Ass’n v. State*, 323 Or 356, 380, 918 P2d 765 (1996) (rejecting City of Portland’s indemnity claim against the state for damages arising from Measure 8 because legislature had not consented to indemnification). Because claims for compensation under Measure 7 are not “torts” within the meaning of ORS 30.285(1),<sup>lxxxiii/</sup> the state cannot be required to indemnify local governments for compensation paid under Measure 7.

HARDY MYERS  
Attorney General

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<sup>i/</sup> On December 6, 2000, the Marion County Circuit Court enjoined, until further order of the court, the Secretary of State from canvassing the votes for and against Measure 7 and enjoined the Governor from declaring or proclaiming whether Measure 7 was adopted at that election, as provided in ORS 254.555 and Article XVII, section 1, of the Oregon Constitution. *McCall v. Kitzhaber*, Cir Ct Marion Cty, Nos. 00C19871, 00C20156 (December 6, 2000).

<sup>ii/</sup> Measure 7 amended the Oregon Constitution by adding subsections (a) to (f) to Article I, section 18. For ease of reference, we will refer to these new provisions as Measure 7. As amended, Article I, section 18, now provides in its entirety as follows:

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

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

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

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

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

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

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

iii/ For ease of reference, we use the term “the beach” in place of the phrase “the beach seaward of the actual vegetation line.”

iv/ The certified ballot title for Measure 7 states:

**Amends Constitution: Requires Payment To Landowner  
If Government Regulation Reduces Property Value**

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

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

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

<sup>vi/</sup> The Explanatory Statement for Measure 7 states:

Ballot Measure 7 would amend the Oregon Constitution to require the state government and all local governments to pay private real property owners when a state or local government regulation restricts the use of real property and reduces its value. “Regulation” is defined as “any law, rule, ordinance, resolution, goal, or other enforceable enactment of government.” “Real property” is defined to include “any structure built or sited on the property, aggregate and other removable minerals, and any forest product or other crop grown on the property.”

The Oregon Constitution now prohibits taking private property for public use without compensating the owner for the value of the property. However, the Oregon Constitution does not require any payment when the value of property is reduced by a regulation that only restricts the use of private property.

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 payment required is the difference in fair market value of the property before and after a regulation is applied. If a claim is denied or remains unpaid 90 days after the claim is made, “just compensation” would also include reasonable attorney fees and necessary collection expenses.

If Ballot Measure 7 passes, state and local governments will have a choice: pay owners of real property under the measure; repeal or change a regulation that is subject to the measure; or contest the application of the measure in court.

Ballot Measure 7 specifically identifies requirements to “protect, provide, or preserve wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archaeological or cultural resources, or low income housing” as regulations requiring payments to landowners. However, its stated coverage is broad enough to cover every regulation, with certain exceptions, that decreases the value of a real property by restricting its use.

Ballot Measure 7 makes exceptions for “historically and commonly recognized nuisance laws,” for regulations required to implement federal law and 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 a gaming parlor. The measure directs that the nuisance law exception be construed narrowly to favor a finding that payment is required.

If passed, the amendment would take effect 30 days after the election.

<sup>vi/</sup> ORS 293.300 requires DAS to disapprove a claim if

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provision for payment thereof is not made by law and appropriation, the obligation or expenditure on which the claim is based is not authorized as provided by law or the claim does not otherwise satisfy requirements as provided by law.

<sup>vii/</sup> ORS 174.100(5) defines the “State Treasury” as including “those financial assets the lawful custody of which are vested in the State Treasurer and the office of the State Treasurer relating to the custody of those financial assets.” ORS 293.265(1) requires that all funds collected or received by, to be expended by or on behalf of, the state be turned over to the State Treasurer.

As discussed below, we conclude that the Oregon Tort Claims Act (OTCA) does not apply to Measure 7 claims. Even if the OTCA did apply, because the state is currently self-insured, Measure 7 claims would be paid exclusively with moneys in the State Treasury.

<sup>viii/</sup> ORS 293.305(3) (1965) provided: “No claim shall be allowed and no warrant drawn until services have actually been rendered, or goods, wares, merchandise or other articles have actually been delivered to and received by the state or its duly authorized agent.”

<sup>ix/</sup> The two-year time limit in ORS 293.321 has exceptions for claims as to which federal funding arrangements require payment within one year and claims for health services under ORS 411.710. These exceptions are not relevant to Measure 7 claims.

<sup>x/</sup> We recognize that in *Suess Builders Co. v. City of Beaverton*, 294 Or 254, 267-68, 656 P2d 306 (1982), the court found ORS 12.080(3) to apply to an inverse condemnation claim. Because this case involved local government, ORS 293.321 could not have applied.

<sup>xi/</sup> The Administrative Procedures Act (APA), ORS chapter 183, establishes procedures for “contested cases,” as defined in ORS 183.310(2).

<sup>xii/</sup> Although the term “regulation” does not include orders or adjudicatory decisions, we conclude in Part III B 2 of this opinion that governmental bodies may “enforce” a regulation through orders or adjudicatory decisions.

<sup>xiii/</sup> The term “real property” is defined in subsection (e) of the Measure as including “any structure built or sited on the property, aggregate and other removable minerals, and any forest product or other crop.” We conclude in Part IV of this opinion that “real property” necessarily includes land as well.

<sup>xiv/</sup> Subsection (c) of Measure 7 states in relevant part: “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.”

<sup>xv/</sup> Because Measure 7 creates a right to compensation only for regulations restricting the use of private real property, regulations that govern the use of public property or private personal property do not require compensation under the Measure, and pre-Measure 7 cases arising from those factual circumstances are not relevant to our analysis.

<sup>xvi/</sup> The Argument in Opposition submitted by Oregon Community Protection PAC in the Voters’ Pamphlet states in part:

**Measure 7 Will Derail Critical Health and Safety Rules.**

Measure 7 would also sabotage protections for your health, home and neighborhood. Taxpayers would be required to pay property owners to comply with important laws that safeguard our health or we would have to simply stop enforcing the laws that protect us.

Heath Regulations that Could Become Impossible to Implement or Enforce if Measure 7 Passes Include:

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- laws that protect children and nonsmokers from secondhand smoke
  - rules that protect drinking water quality
  - rules to prevent cancer-causing pesticides from being sprayed near schools or neighborhoods
  - building safety codes
  - worker safety regulations
  - standards that ensure the safety of our food

An editorial in the EUGENE REGISTER GUARD, Sept. 22, 2000, at page 18A, states:

The poorly worded measure's scope extends far beyond land use laws -- it would require taxpayers to pay property owners, including developers and corporations, to obey *any* regulation, including even the most basic of health, safety and environmental protections.

<sup>xvii/</sup> Nothing in the history of Measure 7 that we have found indicates any expectation on the voters' part that a governmental tax on the value of private real property requires compensation.

<sup>xviii/</sup> Merely because a regulation "restricts the use of private real property" for purposes of subsection (a) of Measure 7, does not mean that the restriction has the effect of reducing the value of a property upon which the restriction is imposed, that the regulation is not within one of the exceptions in subsections (b) or (c) or that the property owner is entitled to compensation under subsection (d).

<sup>xix/</sup> In contrast to "prohibit," the term "restrict" means to "set bounds or limits to : hold within bounds." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993) (hereinafter WEBSTER'S) at 1937.

<sup>xx/</sup> The ballot title and the explanatory statement speak to the timing of adoption and enforcement in relation to when the current owner of property became the owner. The ballot title states that the Measure "[a]ppplies if [the] regulation [was] adopted after the owner acquires [the] property." This statement adds nothing to the text of the Measure. The explanatory statement provides that "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." (Emphasis added.) By inserting the adjective "existing," the explanatory statement appears to imply that the act of adopting a regulation before Measure 7 may give rise to a right to compensation. However, by also using the present passive tense "is adopted" rather than the past tense, the statement also implies that the Measure is intended to apply prospectively. The only means of construing this language to make any sense is that "an existing \* \* \* regulation" is the subject of only the act of first enforcing or applying, and not of adopting. Otherwise, it is difficult if not impossible to understand how an existing regulation could be adopted.

<sup>xxi/</sup> An argument in opposition to Measure 7 in the Voters' Pamphlet submitted by the Oregon League of Women Voters does state that: "Measure 7 would be effective retroactively. Landowners who have continuously owned property since before the date a regulation became effective, could claim compensation. \* \* \* ." This statement does not expressly address whether governmental actions taken before the effective date of Measure 7 give rise to a right to compensation. Rather, we believe that it simply evidences the understanding that Measure 7 claims may arise from the enforcement (after Measure 7) of existing (pre-Measure 7) regulations where the regulation in question became effective after the date an owner became the owner of property affected by the regulation.

<sup>xxii/</sup> See also *Rhodes v. Eckelman*, 302 Or 245, 248-249, 728 P2d 527 (1986) (applying the last two of the presumptions set out in the text above to a statutory amendment).

<sup>xxiii/</sup> The term "impose" means "to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable." WEBSTER'S at 1136.

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<sup>xxiv/</sup> The term “apply” is defined as “**1 a** : to make use of as suitable, fitting, or relevant <[apply] the rule to each situation> \* \* \* **b** : \* \* \* to use for a particular purpose or in a particular case <[apply] money to the payment of a debt> \* \* \* **c** : to bring into action \* \* \* <he applied his brakes quickly> **d** : to put into effect : IMPOSE <[apply] an embargo> \* \* \*.” WEBSTER’S at 105. The term “application” is defined as “**1** : the act of applying: **a** : the bringing to bear (as of one general statement upon another) by way of elucidation \* \* \*.” *Id.*

<sup>xxv/</sup> See discussion above of rules of construction in relation to retroactive effect. Nothing in the Voters’ Pamphlet speaks directly to whether simply allowing a third party to “enforce” a regulation creates a potential right to compensation, and we have found nothing in the media coverage of the Measure that does so.

<sup>xxvi/</sup> The voters’ intent in establishing a separate right to compensation when “government enforces” a regulation (in addition to one created when “government passes” a regulation) is examined in detail in Part III E of this opinion.

<sup>xxvii/</sup> In addition to the explanatory statement, two arguments in opposition to the Measure indicate the clear understanding that it would apply to the future enforcement of existing regulations: “Measure 7 is retroactive. It would require taxpayers to pay landowners for complying with laws passed decades ago.” Argument in Opposition by Joe Landry, Oregon Chapter of the American Planning Association. “And what would our tax dollars be spent on? Paying corporations and individuals simply to obey existing laws.” Argument in Opposition by Representative Earl Blumenauer.

<sup>xxviii/</sup> We have examined both the Voters’ Pamphlet and other materials available to the public in reviewing this question. The ballot title states that the Measure “[a]pplies if regulation adopted after owner acquires property.” This statement simply restates a part, but not all, of the test under subsection (d) to determine if a particular owner is eligible for compensation. As provided in subsection (d), an owner will also qualify for compensation if the regulation was first enforced or applied after the owner became the owner. The ballot title may have led some voters to believe that the only means of qualifying for compensation is if a regulation was adopted after an owner became the owner of property, but the voters are presumed to have read the text of the Measure and know that an owner may also qualify if the regulation was first enforced or applied after the owner became the owner.

Next, the explanatory statement in the Voters’ Pamphlet states in pertinent part that “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 \* \* \*.” The statement adds the clause “existing or future” to further modify “regulation.” The likely meaning of this addition appears to have been an attempt to make the following “clarification”: “Ballot Measure 7 requires payment to a landowner if an existing regulation is first enforced or applied, or a future regulation is adopted, after the current owner became the owner \* \* \*.” Regardless of its intended meaning, the explanatory statement does not assist us in determining whether the voters intended owners to qualify for compensation if the regulation was enforced or applied as to any property, or specifically enforced or applied as to the claimant’s property, after the owner became the owner.

There are several potentially relevant arguments in favor and in opposition to the Measure, but none of them speak clearly to this issue. The first argument in favor, by Dan Dolan, states: “If Measure 7 would have been in place in 1987, the City would have purchased our land for \$14,000.” To those who knew the facts of the Dolans’ dispute with the City, this statement would tend to support an understanding that general enforcement of a regulation prior to ownership would not cut off the right to compensation. But no facts relating to timing of when or how the regulation at issue was first enforced or applied as to the Dolans’ property appear in the Voters’ Pamphlet.

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The next argument with some relevance is an argument against the Measure by the League of Women Voters. This argument states: “Landowners who have continuously owned property since before the date a regulation became effective, could claim compensation.” This argument indicates that the date a regulation takes general effect is the key to determining whether an owner qualifies for compensation, but it is not conclusive on the issue.

Finally, there is the following statement in an argument in opposition to the Measure by Betty Roberts, Jacob Tanzer and William Richardson:

Does the measure require payment even to landowners who bought property knowing its use was restricted when the restriction is ‘applied’, e.g., by the denial of a permit?

This argument correctly identifies the question we are addressing, but does not answer it. The media coverage of the Measure was extensive, but we have found no statements that go directly to this issue.

In the media coverage of the Measure, the following exchange is typical of the confusion expressed over this question:

Opponents said one difficulty in estimating the cost is uncertainty about how courts would interpret the measure’s retroactivity. They said they’re unsure whether it would extend only to regulations imposed since a current owner acquired property, or more broadly to regulations imposed before a change in ownership.

\* \* \* \* \*

Backers said the measure would apply retroactively only to regulations imposed on a property during the current ownership.

“The clear language of this measure says you have to demonstrate you have a loss” in order to have a legitimate claim, George said. “It’s compensation for the landowner for the loss in the uses and the value of the land when they acquired the property.”

OREGONIAN, October 17, 2000, at page A1, A7.

<sup>xxix/</sup> See, e.g., *Ashland Drilling*, 168 Or App at 631-32 (Water Resources Commission authorized, but not required by ORS 536.037 to undertake particular implementation and enforcement actions).

<sup>xxx/</sup> See, e.g., *Anderson v. Peden*, 30 Or App 1063, 1068-69, 569 P2d 633 (1977), *aff’d* 284 Or 313, 587 P2d 59 (1978) (broad standards enforced in sense of being made more specific through action on a particular land use application).

<sup>xxxi/</sup> An important distinction between subsections (a) and (d) of the Measure is that the former is dependent on government action, while the latter is not. Thus, under subsection (d), if an owner of property subject to the regulation had been compelled by a private action to comply with the regulation, that would act to bar the right to compensation for that regulation generally.

<sup>xxxii/</sup> The explanatory statement for Measure 7 says that “[i]f Ballot Measure 7 passes, state and local governments will have a choice: pay owners of real property under the measure; repeal or change a regulation that is subject to the measure; or contest the application of the measure [to the regulation] in court.”

<sup>xxxiii/</sup> Our conclusion that one who owns an interest in a building, forest product or crop but does not own the land does not have a claim for compensation under Measure 7 does not preclude the landowner from making a claim based on a reduction in fair market value due to a restriction on use affecting the interest-holder.

<sup>xxxiv/</sup> The legislature appropriates moneys in two basic ways, specific biennial appropriations and continuing appropriations. In the absence of specific laws to the contrary, specially dedicated funds are

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continually appropriated to their legally dedicated purposes. *See* ORS 293.120. In addition, federal financial assistance and grant money is continually appropriated to the purposes of the federal programs or grants. *See* ORS 293.550. The expenditure limit of biennial appropriations is reflected in the amount of the appropriation. The expenditure limit of continuing appropriations typically is reflected in biennial laws that specify the amount of the continuing appropriation that may be expended.

<sup>xxxv/</sup> Article XI, section 7, of the Oregon Constitution provides in relevant part: “The Legislative Assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars.”

<sup>xxxvi/</sup> Not all appropriations are subject to the allotment system. For instance, expenditures from dedicated, revolving and trust funds are not subject to allotment. ORS 291.238(2).

<sup>xxxvii/</sup> Under ORS 291.252, DAS may modify an agency’s allotment. See discussion in Part VI A 2 of this opinion.

<sup>xxxviii/</sup> Subsection (d) of Measure 7 provides that “[c]ompensation 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.” Based on this language, we conclude that an agency incurs an obligation to pay a Measure 7 claim on the 90<sup>th</sup> day after the property owner files the claim if the regulation continues to apply to the property on that date and all other requirements of the Measure are met.

<sup>xxxix/</sup> The OTCA’s definition of “public body” includes the state and any department, agency, board or commission of the state. ORS 30.260(4)(a).

<sup>xl/</sup> “‘Inverse condemnation’ is neither a constitutional nor a statutory term but only ‘the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.’” *Suess Builders*, 294 Or 254, 258, n 3, 656 P2d 306 (1982) (quoting *Thornburg v. Port of Portland*, 233 Or 178, 180 n 1, 376 P2d 100 (1963)).

<sup>xli/</sup> Before adoption of Measure 7, the Oregon Supreme Court held that Article I, section 18, is “unquestionably self-executing.” *Tomasek v. Oregon Highway Comm’n*, 196 Or 120, 143, 248 P2d 703 (1952). The court said that the protection given a property owner under Article I, section 18 “is an absolute right, and, for its violation, the injured person may have his remedy in a common-law action in the absence of statutory provision therefor.” *Id.* We find no basis upon which to conclude that Article I, section 18, subsequent to its amendment by Measure 7, does not remain self-executing.

<sup>xlii/</sup> ORS chapter 35 addresses condemnation generally, while ORS chapter 281 contains statutes that exclusively address condemnation by the state.

<sup>xliii/</sup> ORS 281.220 provides the following scheme to be used by the state when it cannot agree with a property owner on just compensation:

Whenever the state requires property for any public use, the necessity for the acquisition to be decided and declared in the first instance by the board, if the board and the owner of such property cannot agree upon the price to be paid for the amount of or interest in the property required for such public use, and the damages for the taking thereof, the board may request the Attorney General to, and the Attorney General shall when so requested, commence and prosecute in any court of competent jurisdiction in the name of the State of Oregon any necessary or appropriate suit, action or proceeding for the condemnation of the amount of or interest in the property required for such purposes and for the assessment of the damages for the taking thereof.



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<sup>xliv/</sup> We use the term “valid claim” to mean a claim as to which the property owner is entitled to just compensation because all of the requirements of Measure 7 are met.

<sup>xlv/</sup> In Part III E of this opinion, we address the meaning of the phrase “continues to apply” in subsection (d) of Measure 7. We conclude there that the phrase means that the regulation is still in general effect and is legally capable of being enforced to restrict the use of the property by any means. We also conclude there that in cases where the government is required to regulate in a manner that restricts the use of real property, or where there is a right for a third party to compel enforcement, the only certain means to stop a regulation from continuing to apply is to repeal it. In this portion of the opinion, we address the authority of a state agency to forego enforcement of a regulation. Consistent with Part II E of this opinion, foregoing enforcement of a regulation will mean that the regulation will not continue to apply only if the government cannot be compelled to regulate and if there is no third party right to enforce the regulation directly through judicial action.

<sup>xlvi/</sup> DAS may prescribe an allotment period other than the calendar quarter. ORS 291.234(2). Because most agencies use a quarterly allotment, we use this in our analysis.

<sup>xlvii/</sup> Under ORS 291.252, DAS may also modify an allotment at any time, either in response to an application from the agency or on notice to the agency, so long as the modification does not reduce the allotment “below the amount required to meet valid obligations or commitments previously incurred against the allotted funds.” The allotment statutes do not require an agency to request that DAS modify the agency’s allotment or otherwise authorize payment from unallotted funds. We believe that an agency’s enabling statutes would require the agency to do so, however, if the agency’s allotment for the quarter in which a valid Measure 7 claim will be due is insufficient to pay that claim and if the agency’s enabling statutes do not give the agency discretion to forego enforcing the regulation giving rise to the Measure 7 claim.

<sup>xlviii/</sup> At the time of our 1961 opinion, DAS was known as the Department of Finance and Administration.

<sup>xlix/</sup> Because the duty to pay compensation to property owners under Measure 7 is a constitutional obligation, if the agency did incur liability for a Measure 7 claim that was in excess of its quarterly allotment, we believe that the obligation would be binding against the state notwithstanding the provision to the contrary in ORS 291.238 so long as the obligation did not violate other constitutional constraints, such as the debt limit in Article XI, section 15.

<sup>l/</sup> A person who makes or orders or votes to make any expenditure in violation of ORS 291.238, or who makes or authorizes or causes to be made any disbursement of funds from the State Treasury in violation of ORS 291.238 commits a violation, punishable by a fine of not less than \$500 nor more than \$3,000. ORS 291.990(1). In addition, any person who incurs or orders or votes to incur an obligation in violation of ORS 291.238 is jointly and severally liable therefor to the person in whose favor the obligation was incurred. ORS 291.990(2).

<sup>li/</sup> In our 1961 opinion, we concluded that ORS 291.238 would prohibit the Tax Commission from incurring any expense or obligation for which no allotment had been made. 30 Op Atty Gen at 286. That opinion did not address, however, what an agency should do in the face of mandated activities that the agency could not curtail.

<sup>lii/</sup> With respect to Measure 7 claims, we conclude that an agency “incurs” an obligation on the 90<sup>th</sup> day after the claim is filed because that is the earliest possible day on which the agency may be obliged to pay the claim. See Measure 7, subsection (d).

<sup>liii/</sup> Lacking the definite nature of a “debt,” a “liability” arises through the creation of an obligation that may be enforced against the general treasury. See *Salem Water Co. v. City of Salem*, 5 Or 29, 32,

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1873 WL 948 (1873) (“whether this obligation [an agreement to pay for water] can be called a debt in the technical sense or not, it is at least a liability; that is, the city is ‘bound and obliged in law’ to pay for the water furnished by the company”).

<sup>liv/</sup> The agency would need to stop enforcing the regulation against any property for which an owner files a claim, if the agency incurring an obligation to pay that claim would cause the state to violate the debt limit. It is possible, however, that to avoid violating Article I, section 20, of the Oregon Constitution, the agency would be required to stop its enforcement actions against other properties as well. See discussion of the equal privileges and immunities requirements of Article I, section 20, of the Oregon Constitution in Part VI B of this opinion. Treatment of this question is beyond the scope of this opinion.

<sup>lv/</sup> See immediately preceding note.

<sup>lvi/</sup> Some statutes directly restrict the use of private real property and are not dependent upon agency enforcement, such as certain landlord-tenant laws in ORS chapters 90 and 91. These statutes will continue to apply unless they are repealed or the debt limit in Article XI, section 7, of the Oregon Constitution is reached.

<sup>lvii/</sup> The APA, ORS 183.325 to 183.355, requires that standards of general applicability that implement or prescribe agency policy or describe the agency’s practices or procedures must be codified through rulemaking. See definition of “rule” in ORS 183.310(8).

<sup>lviii/</sup> The entire criminal code was repealed and replaced with a new criminal code in 1971. See Anthony Yturri, *The Three R’s of Penal Law Reform*, 51 Or L Rev 427 (1972) (citing Or Laws 1971, ch 743 (SB 40)). As a result of this *en masse* repeal, there is little legislative history pertaining specifically to the repeal of ORS 161.310, or indicating why a similar provision was not enacted as part of the new criminal code.

<sup>lix/</sup> We recognize that the term “police power” is disfavored and can be misleading as a general description of law-making authority rather than as the use of that authority for particular purposes. See *Dennehy v. Dept. of Rev.*, 305 Or 595, 604 n 3, 756 P2d 13 (1988), *reversed in part*, 308 Or 423, 781 P2d 346 (1989). Nevertheless, we use the term here to describe the historical development of the use of the state’s plenary legislative powers for particular purposes (usually described as the protection of the public health, safety or welfare) and judicial decisions describing the limits on that plenary power under Article I, section 18.

<sup>lx/</sup> The scope of these laws is similar to the specific exception in subsection (c) of Measure 7 for regulations that prohibit “the use of property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor.” However, nothing in ORS 105.555 relates to the use of real property for the sale of pornography, performing nude dancing, the *sale* of alcohol or other controlled substances. The only possible overlap between the two exceptions under this narrow reading of subsection (b) is with regard to using property to operate a casino or gaming parlor.

<sup>lxi/</sup> For a more narrow view of the traditional “nuisance” exception under Article I, section 18, see *Emery v. State*, 64 Or App 429, 668 P2d 484, 1983), *reversed* 297 Or 755, 766-767, 688 P2d 72 (1984).

<sup>lxii/</sup> With respect to many of these laws, the risk to the state and local governments of not regulating in accord with federal requirements includes loss of federal program delegation and funding as well as direct assumption of enforcement by the federal government. Historically, the Oregon legislature has consistently enacted laws providing for state assumption of federally delegable environmental programs. See e.g., ORS 466.086; 468A.305; 468B.030. Federal takeover of the programs has been viewed as repugnant to the interests of the state. See ORS 468A.305. Nothing in Measure 7 indicates that the

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voters intended that state and local government repudiate their historical role in implementing these federally delegated programs.

<sup>lxiii/</sup> The history of the Measure is not helpful in interpreting the exception in subsection (c) of the Measure. The explanatory statement in the Voters' Pamphlet merely states that Measure 7 makes exceptions for "regulations required to implement federal law."

<sup>lxiv/</sup> The relevant dictionary definitions of "extent" are:

**5 a (1) :** the range (as of inclusiveness or application) over which something extends : SCOPE, COMPASS, COMPREHENSIVENESS <within the [extent] of human knowledge> <the [extent] of his authority> <the [extent] of the law> (2) : the point or degree to which something extends <they spent money to the [extent] of \$1500> : the limit to which something extends <exerting the full [extent] of his power> <to a certain [extent] she was fond of him> \* \* \*.

WEBSTER'S at 805.

<sup>lxv/</sup> In order to avoid delay in issuing this opinion, we have included a discussion of only three programs and may issue a supplemental opinion addressing the impact of Measure 7 on additional programs.

<sup>lxvi/</sup> Nyran Rasche, *Protecting Agricultural Lands in Oregon: An Assessment of the Exclusive Farm Zone System*, 77 OR L REV 993, 995 (1995).

<sup>lxvii/</sup> If the use that is proposed is an "urban" use, however, the property owner will also either have to comply with LCDC Goal 14 (Urbanization) and its various implementing rules, or to request an exception to Goal 14 as well. In addition, other goals may be applicable to a request to amend the plan and zoning designation of a particular property depending on its characteristics and the provisions of the local comprehensive plan and land use regulations.

<sup>lxviii/</sup> See note 79, below.

<sup>lxix/</sup> The coastal zone in Oregon under the CZMA is generally the area west of the crest of the Oregon coast range or mountains. OAR 660-035-0110(7).

<sup>lxx/</sup> In addition to the 1993 changes relating to secondary lands, marginal lands, and generally providing various provisions allowing dwellings on lots and parcels created before particular dates, there have been legislative changes to the uses allowed in EFU zones in most if not every legislative session since 1975. See, e.g., note following ORS 215.213.

<sup>lxxi/</sup> The "beach" consists of various areas under state and federal law. The intertidal or wet-sands area extends from the extreme low tide line to the line of ordinary high tide. The state owns this area of the beach. ORS 390.615. The area between the ordinary high tide line and the visible line of vegetation (also known as the "actual vegetation line") is the "dry sand" area of the beach. "Uplands" are the area further landward, above the actual vegetation line. Two other lines play a role in regulation of the beach. The "16-foot contour line" is a topographical line employed in the 1967 Beach Bill to describe an area that generally corresponds to the vegetation line. The 1969 amendments to the Beach Bill replaced this line with a surveyed vegetation line set out in ORS 390.770.

Two other lines play a role in regulation of the beach. The "16-foot contour line" is a topographical line employed in the 1967 Beach Bill to describe an area that generally corresponds to the vegetation line. The 1969 amendments to the Beach Bill replaced this line with a surveyed vegetation line set out in ORS 390.770.

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<sup>lxxii/</sup> The statutory vegetation line was the result of a survey that the State Highway Commission was directed to perform in order to locate the boundaries of the area over which the Highway Commission had regulatory authority under the 1967 legislation. *See* Or Laws 1967, ch 601, § 11.

<sup>lxxiii/</sup> As early as 1947, the State Highway Commission designated sections of the beach where automobiles were permitted and, in 1961, established speed limits to regulate automobiles as both “a nuisance and a hazard.” STRATON, OREGON’S BEACHES, A BIRTHRIGHT PRESERVED (1977).

<sup>lxxiv/</sup> In 1969, the Oregon Department of Transportation (ODOT) was created and the responsibilities of the State Highway Commission were consolidated under the control of the State Transportation Commission. Or Laws 1969, ch 599. In 1979, State Parks and Recreation was made a separate division of ODOT. Or Laws 1979, ch 186. Then in 1989, the duties of the Parks and Recreation Division under ORS chapter 390 were transferred to the newly created State Parks and Recreation Department. Or Laws 1989, ch 904, § 39.

<sup>lxxv/</sup> The *Thornton* court noted that the public’s right to enjoy the dry-sand area had been previously unquestioned, and even reinforced by previous judicial decisions. 254 Or at 589. Eventually, however, public debate resulted in the Beach Bill as an attempt to resolve conflicts between public and private interests in the dry sand area. *Id.* at 590.

<sup>lxxvi/</sup> In *Thornton* the court left open the question of whether ORS 390.640 would be constitutional if it were to be applied as a zoning regulation to lands upon which the public had not acquired rights of recreational use. 254 Or at 587-88. In *Stevens*, the court held that the regulations at issue did not work a facial taking, but only because those regulations on their face would permit the building of a seawall under some circumstances. 317 Or at 147-48. The court did not say that the doctrine of custom enunciated in *Thornton* necessarily prevented the Beach Bill from effecting a taking in all cases.

<sup>lxxvii/</sup> The *Thornton* and *Stevens* decisions both addressed impediments to public access to the beach. It is not clear how far a court would go to find a public right to restrict a use that could be considered to impair the use of the beach without preventing access. *But see State Highway Comm. v. Fultz*, 261 Or 289, 293, 491 P2d 1171 (1971) (court approves and adopts trial court finding that road on dry-sand area would be “unsightly blemish upon an otherwise natural area of considerable scenic beauty,” “a considerable hazard to the public at periods of extreme high tide” hindering escape, and an erosion factor). An examination of each regulation is beyond the scope of this opinion.

<sup>lxxviii/</sup> Areas in which the surveyed vegetation line is further inland than the actual vegetation line include approximately 4,000 acres in the Clatsop Plains which is the area from Gearhart North to Camp Rilea, as well as portions of Cannon Beach and Manzanita. Some of these lands may, however, be subject to recorded public easements that limit the rights of the property owner.

<sup>lxxix/</sup> The Oregon Coastal Management Program (OCMP) is the program that was approved by the federal Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration, United States Department of Commerce, in 1977 and all federally approved amendments thereto. OAR 660-035-0010(19).

<sup>lxxx/</sup> ORS 459A.710 provides, with certain exceptions specified in ORS 459A.715, that:

(1) A dealer shall not refuse to accept from any person any empty beverage containers of the kind, size and brand sold by the dealer, or refuse to pay to that person the refund value of a beverage container as established by ORS 459A.705.

(2) A distributor shall not refuse to accept from a dealer any empty beverage containers of the kind, size and brand sold by the distributor, or refuse to pay the dealer the refund value of a beverage container as established by ORS 459A.705.

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<sup>lxxxi/</sup> Article I, section 15, of the Oregon Constitution provides in relevant part as follows:

(1) Except as provided in subsection (7) of this section, when the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity.

(2) As used in this section:

(a) "Enterprise activity" means a program under which a local government sells products or services in competition with a nongovernment entity.

(b) "Local government" means a city, county, municipal corporation or municipal utility operated by a board or commission.

(c) "Program" means a program or project imposed by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally.

(d) "Usual and reasonable costs" means those costs incurred by the affected local governments for a specific program using generally accepted methods of service delivery and administrative practice.

\* \* \* \* \*

(6) Except upon approval by three-fifths of the membership of each house of the Legislative Assembly, the Legislative Assembly shall not enact, amend or repeal any law if the anticipated effect of the action is to reduce the amount of state revenues derived from a specific state tax and distributed to local governments as an aggregate during the distribution period for such revenues immediately preceding January 1, 1997.

(7) This section shall not apply to:

(a) Any law that is approved by three-fifths of the membership of each house of the Legislative Assembly.

\* \* \* \* \*

(c) An existing program as enacted by legislation prior to January 1, 1997, except for legislation withdrawing state funds for programs required prior to January 1, 1997, unless the program is made optional.

\* \* \* \* \*

(f) Legislation enacted or approved by electors in this state under the initiative and referendum powers reserved to the people under section 1, Article IV of this Constitution.

\* \* \* \* \*

(11) In lieu of appropriating and allocating funds under this section, the Legislative Assembly may identify and direct the imposition of a fee or charge to be used by a local government to recover the actual cost of the program.

<sup>lxxxii/</sup> A "program" subject to the Article XI, section 15 funding obligation is one requiring a local government to provide "administrative, financial, social, health or other specified services to persons \* \* \* or to the public generally." Or Const Art XI, § 15(2)(c). Although we have previously concluded that "financial \* \* \* services to persons" includes the provision of retirement benefits to local government

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retirees, 49 Op Atty Gen \_\_ (No. 8263, January 22, 1999), we believe it is doubtful that the Measure 7 duty to pay compensation to property owners would be considered a “program” for purposes of Article XI, section 15. Whether the types of regulations involved here are a “program” for purposes of Article XI, section 15, is beyond the scope of this opinion.

<sup>lxxxiii/</sup> See discussion of Oregon Tort Claims Act in Part V B of this opinion.